IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-IA-00166-SCT

IN RE: CHARLES HOOKER, DAVID GATLIN, NATHAN KERN, ANTHONY MCCRAY, KIRBY TATE, KATHERINE ROBERTSON, AARON BROWN, JOSHUA HOWARD, AND AZIKIWE KAMBULE

DATE OF JUDGMENT: 01/24/2012

TRIAL JUDGE: HON. TOMIE T. GREEN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS: THOMAS M. FORTNER

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BY: JIM HOOD

ALEXANDER KASSOFF

MEREDITH MCCOLLUM ALDRIDGE BRIDGETTE WILLIAMS WIGGINS

DAVID K. SCOTT

NATURE OF THE CASE: CIVIL - OTHER

DISPOSITION: REVERSED AND RENDERED - 03/08/2012

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

EN BANC.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

- ¶1. At the outset, we wish to state that this case is not about whether the governor is above the law. He clearly is not, and any implication in the dissents, or elsewhere, that he is or that a majority of this Court believes he is is incorrect. This case is about whether this Supreme Court has the right, authority, and power to declare itself superior to, and above, both the other two branches of government in all matters of constitutional compliance. While this Court clearly has the constitutional duty to interpret the *content* of laws passed by the Legislature and executive orders issued by the governor, we decline as have so many other courts before us to assume for ourselves the absolute power to police the other branches of government in fulfilling their constitutional duties to produce laws and executive orders, unless there is alleged a justiciable violation of a personal right.
- ¶2. Attorney General Jim Hood asks the judicial branch of government to void several pardons, alleging the applicants failed to publish notice as required by Section 124 of the Mississippi Constitution, which states:

In all criminal and penal cases, excepting those of treason and impeachment, the governor shall have power to grant reprieves and pardons, to remit fines, and in cases of forfeiture, to stay the collection until the end of the next session of the legislature, and by and with the consent of the senate to remit forfeitures. In cases of treason he shall have power to grant reprieves, and by and with consent of the senate, but may respite the sentence until the end of the next session of the legislature; but no pardon shall be granted before conviction; and in cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, and in case there be no newspaper published in said county, then in an adjoining county, his petition for pardon, setting forth therein the reasons why such pardon should be granted.¹

¹Miss. Const. art. 5, § 124 (1890).

After we received this appeal, Governor Barbour – who issued the pardons – submitted an *amicus curiae* brief, and we allowed his counsel to participate in oral argument. At oral argument, we asked Attorney General Hood to point out any pardon that was not facially valid, and he could not.

- ¶3. The parties and Governor Barbour have presented numerous issues for our consideration, including: whether those who did not apply for a pardon were required to publish notice; whether the governor and not the convicted felons applied for some of the pardons; whether some of the pardons had any applicant at all; whether the publication provision requires four or five weekly publications; whether the governor, the attorney general, or the pardonees have the burden of proof; and whether the attorney general is estopped from objecting to the pardons.
- ¶4. The contrasting views on these and other issues were forcefully and passionately argued in an array of briefs, dissents, and in an extended oral argument. But we need not discuss these issues because, even assuming the attorney general's views are correct, the controlling issue is not whether Section 124 requires applicants for pardons to publish notice—it clearly does. The controlling issue is whether the judicial branch of government has constitutional authority to void a facially-valid pardon issued by the coequal executive branch, where the only challenge is compliance with Section 124's publication requirement.
- ¶5. No judicial duty is more central to the proper operation of our system of government than is our duty to decide this issue correctly. In carrying out this duty, as we must, and respecting the clear constitutional provisions that separate our powers from the governor's

powers, we are compelled to hold that – in each of the cases before us – it fell to the governor alone to decide whether the Constitution's publication requirement was met.

BACKGROUND FACTS AND PROCEEDINGS

- ¶6. During his last days in office, Governor Haley Barbour granted executive clemency to 215 persons, most of whom were no longer in custody. Of the twenty-six persons in custody, Governor Barbour granted ten full pardons; thirteen medical releases; one suspension of sentence; one conditional, indefinite suspension of sentence; and one conditional clemency.
- ¶7. Attorney General Jim Hood filed a civil action in the Circuit Court of the First Judicial District of Hinds County, alleging he had "reason to believe that former Governor Barbour's attempted pardons . . . were in violation of Section 124 of the Mississippi Constitution." Section 124 requires an applicant for a pardon to publish a petition stating why the pardon should be granted.
- ¶8. The attorney general initially named five defendants, but then requested the circuit judge to declare all pardons it found to be in violation of Section 124 null, void, and unenforceable. The circuit judge issued a temporary restraining order (TRO), requiring every person granted a pardon by Governor Barbour to provide the court "sufficient proof [of publication] consistent with Section 124 of the Mississippi Constitution" The TRO also prohibited the Mississippi Department of Corrections' releasing any person pardoned by Governor Barbour, until the Department had provided the court sufficient proof of acceptable Section 124 publication.

¶9. The circuit judge extended the TRO and ordered the defendants to appear at a preliminary injunction hearing. The appellants petitioned this Court for permission to file an interlocutory appeal. We granted the appellants' petitions, stayed all proceedings in the circuit court, and ordered that the trial court's extended TRO remain in effect until further order of this Court.

ANALYSIS

¶10. Governments are operated by people. And no government has ever existed without disputes among those in positions of power. Some disputes – perhaps most – are settled by compromise. But when a compromise cannot be reached, ultimate authority must rest somewhere to settle the disputed question. In some nations, that final authority rests with a king. For others, such decisions are made by a military leader. But by deliberate design, our system of government is different.

¶11. Our Constitution divides governmental power among three branches, or departments, of government. And so important did the drafters regard the separation of those powers that they addressed it in the first two sections of our 1890 Constitution:

ARTICLE 1, SECTION 1.

The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.²

ARTICLE 1, SECTION 2.

No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the

² Miss. Const. art. 1, § 1 (1890).

others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.³

¶12. Our state government was modeled after the federal system. And for fifteen years after the people ratified the Federal Constitution, the three branches of the federal government struggled with issues regarding their respective powers. Then, in 1803, the United States Supreme Court reviewed a case and rendered a landmark decision that directly addressed the separation of powers.

Marbury v. Madison⁴

¶13. As John Adams's presidency came to a close, and his Federalist Party began losing power, Thomas Jefferson – who, as a member of the "Republican-Democrat" party, opposed consolidation of power in the federal government – was due to succeed President Adams in March 1801. Adams's lame-duck Federalists – desperate to preserve power – passed the Organic Act and the Judiciary Act, which allowed Adams to appoint forty-two justices of the peace and sixteen new circuit-court justices for the District of Columbia. After Adams signed the commissions of these new judges (known today as the "midnight judges"), his Secretary of State, John Marshall (who, interestingly, was later to author *Marbury v. Madison*), sealed them.

¶14. But when President Jefferson took office, he refused to honor the commissions because they were not delivered until after President Adams's term had expired. William

³ Miss. Const. art. 1, § 2 (1890).

⁴*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

Marbury, who was due a commission, applied for a writ of mandamus⁵ asking the Supreme Court of the United States to compel President Jefferson's Secretary of State, James Madison, to deliver the commissions.

¶15. The Supreme Court held the commissions were valid and binding when signed by President Adams, but refused to grant Marbury's request for a writ of mandamus because the matter was outside the Court's original jurisdiction. While the Court's disposition of Marbury's commissions issue is of little importance today, its disposition of the jurisdictional issue and its comments on the separation of powers are of central importance.

¶16. The jurisdictional issue arose from a claim that, when Congress passed the Judiciary Act, it overstepped its bounds by granting the Supreme Court jurisdiction to issue writs of mandamus. The Court held that the Constitution, not the Congress, established its jurisdiction. So after declaring that Marbury's commission was indeed valid when signed by President Adams, the Court nevertheless refused to issue a writ of mandamus – and Marbury did not get his commission.

¶17. In reviewing judicial versus executive power, the Court held that it falls to the judiciary to decide the constitutionality of Congressional acts. But it also recognized that conflicts would arise among the constitutionally established branches of government

⁵ Congress passed the Judiciary Act of 1789, expanding the Supreme Court's jurisdiction to include the original jurisdiction and authority to issue writs of mandamus "... to any courts appointed, or persons holding office, under the authority of the United States." *Marbury*, 5 U.S. at 148.

⁶**Id.** at 162.

regarding the separation of powers, and the Court recognized the judiciary's potential abuse of that power.

¶18. Despite the *Marbury* Court's declaration of its "emphatic" duty to interpret the Constitution, Chief Justice Marshall cautioned:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.⁷

Under this doctrine, the United States Supreme Court – as well as this Court – has refused to exercise jurisdiction over a matter when there was a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" This principle has carried forward.

Nixon v. U.S.

¶19. For example, in *Nixon v. U.S.*, when a former district-court judge who had been convicted of perjury refused to resign, the House of Representatives presented three articles of impeachment to the Senate. Under Senate Rule XI, a committee of senators held hearings

⁷*Marbury*, 5 U.S. at 170.

⁸*Nixon v. U.S.*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (internal citations omitted).

⁹*Id*.

¹⁰**Id.** at 226.

¹¹**Id.** at 227.

to receive evidence and take testimony.¹² The transcripts of those hearings, as well as a summary of the evidence and facts, were presented to the full Senate for a vote.¹³ After briefing and argument, the Senate convicted the judge.¹⁴

¶20. The judge filed suit, arguing that Senate Rule XI violated Article I, Section 3, Clause 6, of the U.S. Constitution, which reads: "The Senate shall have the sole power to try all Impeachments." The judge argued that the Senate was not above the Constitution, and the Constitution guaranteed him a trial before the Senate, not a hearing before a committee. ¹⁶ ¶21. The Supreme Court refused to rule on the issue, holding that to do so would be mandating and regulating a procedure specifically committed to the Senate – *not* the Court. Further, the Senate must function independently and without interference from another branch in order to maintain the constitutional separation of powers. ¹⁷ Any attempt by the Court to adjudicate the Senate's impeachment procedure "would introduce the same risk of

bias as would participation in the trial itself."18

 $^{^{12}}$ *Id*.

¹³**Id.** at 227-28.

¹⁴**Id.** at 288.

¹⁵*Nixon*, 506 U.S. at 228; U.S. Const. art. I, § 3, cl. 6.

¹⁶**Nixon**, 506 U.S. at 229.

¹⁷**Id.** at 231.

¹⁸**Id.**

¶22. The *Nixon* Court also noted that the Framers specifically – and textually – committed the impeachment power and its procedure to the Legislature as a check on the powers of the judiciary. ¹9 Therefore, according to the Court:

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the important constitutional check placed on the Judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.²⁰

- ¶23. The Court concluded that, while the judiciary does possess the power to review legislative or executive action exceeding constitutional limits, the Court cannot review or interpret a constitutional procedure that has been textually committed to another branch.²¹
- ¶24. The *Nixon* Court found the constitutional system of checks and balances essential to preserving the separation of powers. As stated by James Madison in Federalist Number 48:

The powers properly belonging to one of the departments ought not to be directly and completely administered by either of the departments It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it [T]he next and most difficult task is to provide some practical security for each, against the invasion of the others.²²

¹⁹**Id.** at 234-35.

²⁰*Id.* at 236 (internal quotations omitted) (emphasis added).

 $^{^{21}}$ *Id.* at 238.

²² The Federalist No. 48 (James Madison) (emphasis added); *see also* Jeffery Jackson & Mary Miller et al., eds., *Encyclopedia of Mississippi Law* § 19:17 (2010) (pardon power is a check on the judiciary); James Wilson, *Executive Dept., Lectures on Law* (1791); Joseph Story, *Commentaries on the Constitution* 3: §§ 1488-98 (1833).

- ¶25. So, according to *Marbury* and its progeny, cases and controversies involving interpretation and adjudication of constitutional provisions that are textually committed to another branch of government are nonjusticiable.
- ¶26. Here, we must examine our precedent regarding the separation of powers and the justiciability of such issues before the courts of Mississippi.
- ¶27. More than once and dating back to cases decided under previous versions of our Constitution this Court has determined that compliance with constitutional provisions that are procedural in nature and committed solely to another branch of government is not justiciable.

Ex Parte W. V. Wren

¶28. Because many of the attorney general's (and the dissents') arguments in this case closely parallel the arguments presented in *Ex Parte W. V. Wren*,²³ and because the *Wren* Court rejected those arguments for most of the same reasons we reject the Attorney General's today, we provide an extended analysis.

Background of the case

¶29. In 1886 the Mississippi Secretary of State enrolled a law that placed a privilege tax "on each person traveling and selling goods or merchandise by sample or otherwise in this State."²⁴ The bill had been "signed by the speaker of the house of representatives, the

²³Ex Parte Wren, 63 Miss. 512, 1886 WL 3462 (Miss. 1886), 56 Am. Rep. 825 (1886).

²⁴**Id.** at *1.

president of the senate, and the governor."²⁵ On its face, the bill appeared to be a valid and duly enacted law.

¶30. But when W. V. Wren was arrested in Jackson for selling goods without paying the tax required under the statute, he obtained a writ of habeas corpus, alleging that the statute was unconstitutional and unenforceable because the bill presented to the governor for signature was not the bill passed by the Senate and House of Representatives. Wren argued that, if the court would simply look at the legislative journals, it would see that "amendment 34" – an amendment whose language would have exempted him from the tax – was added by the Senate and accepted by the House of Representatives. He further argued that a basic prerequisite (or condition precedent) to the validity of a law is that the law be the one actually passed by the houses of the Legislature.

Wren's brief

¶31. Making an argument strikingly similar to the concerns raised by Justice Randolph in dissent, Wren's brief to this Court— written more than 120 years ago – stated:

If the court can only look at the face of the bill as enrolled, then the limitations in the constitution are void and of no effect, and the powers pretended to be thereby conferred upon the judiciary are of no avail, for the legislature promulges the act, and there exists no power to question it. It makes the legislature the judge whether the provisions of the constitution have been infringed. It violates the provisions of that instrument by allowing the legislative branch to exercise judicial functions.²⁷

²⁵**Id.** at *8.

²⁶**Id.** at *6.

 $^{^{27}}$ **Id.** at *1.

¶32. Simply stated, Wren argued that courts must look behind the face of a statute and review the issue of whether the constitutional prerequisites were met when the law allegedly was passed. Any refusal to do so, he argued, would render the constitutional limitations on the Legislature "void and of no effect," and would eviscerate the concept of judicial review of constitutional questions. Wren's argument is a direct parallel to Attorney General Hood's argument that:

the governor [the Legislature] cannot exercise the pardon power [the power to enact legislation] (or any other power) in derogation of the Constitution. The Constitution sets several limits on the manner in which the pardon power can be exercised [legislation may be enacted]. And those limits – and whether the Governor [the Legislature] acted within them – are precisely what the courts can, and, in this case must, review.²⁹

¶33. Wren further argued that "there must be evidence of some character, outside of the face of the enrolled bill, by which the judge can determine whether the act has been passed in the mode and within the limits prescribed by the constitution."³⁰ He continued:

The judiciary, to determine whether an alleged statute is a law, must find as a fact that the alleged statute passed both houses and was signed in open session, and that the bill "which has passed both houses" is the one approved.³¹

¶34. Wren then argued that the constitutional requirements (that both houses of the Legislature must pass a bill before presenting it to the governor) are "necessary elements in

 $^{^{28}}$ *Id*.

²⁹We have recited the quote from the Attorney General's brief, but the bracketed language is ours. We included it to demonstrate the parallel between the *Wren* case and the case before us today.

³⁰*Wren*, 1886 WL 3462, at *2.

 $^{^{31}}$ *Id.* at *2.

a valid statute," and that they were "required by the constitution."³² He urged that the matter was open to judicial review, and that "[t]he court must find as a fact that the identical bill as passed was approved. These facts must exist to make the statute valid."³³ Wren also argued that judicial review was required so that "the blunders of petty clerks may be prevented from becoming the solemn laws of the land."³⁴

Wren's argument before the Court

¶35. At oral argument, Wren's counsel set out the contrasting positions of his client, on the one hand, and the attorney general (who, interestingly, argued against judicial review) on the other:

On one side it is affirmed that the journals of the two houses may be consulted either by the courts on the ground that, being required to take judicial notice of what are the laws of the land, they may look at the journals, kept under a mandate of the constitution, as an authentic record of what the legislature did, or the courts may receive them as evidence if the issue of fact can be made; that any court may, without calling for proof, if the question of enacted or not enacted can be raised where an authenticated act, or what purports to be an act, is found on file in the office of the secretary of state, inspect the journals to determine it, without an issue of fact; but that in whatever form the question arises the journals may be consulted, and if they plainly show that the pretended act did not receive the assent of the two houses, it must be held to be a nullity.

On the other side, the proposition is that when there appears an authenticated act, duly filed in the office of the secretary of state, the question of enacted or not enacted cannot arise. It is not a question about the matter sought to be proved, as to the manner of the act, nor the kind of evidence which may be received, because no proof can be received as to any matter touching it. It is not open to inquiry whether the enrolled act passed or not. That unless the

 $^{^{32}}$ **Id.** at *3.

³³*Id*.

 $^{^{34}}$ **Id.** at *6.

journals are by positive law made evidence on such a question, they are of no more weight than any other fact or circumstance, as no fact or circumstance can be brought forward. Investigation is shut out.

¶36. Wren's counsel – as has the attorney general in the case before us today – advanced numerous other arguments, including the following: "Now, it is clear that our American constitutions are not part of the common law, nor can that law circumscribe or hamper them or place artificial barriers to the assertion of right by the people, though it may assist in interpreting them;" and "[w]e insist that it is now the adjudged law of this State that the enrolled act in the office of the secretary of state is only prima facie evidence that the act was enacted and that the journals may be consulted, and if from the journal it appears that the act did not pass, it must on that evidence be declared void."³⁵

The Court's decision in Wren

¶37. In deciding the issue, this Court first restated Wren's position that the statute under which he was arrested, although facially valid, was "not to be accepted as a law"³⁶ because, from a review of "the journals of the senate and house"³⁷ it appeared that amendment 34 – the amendment that "related to that part of the bill which imposed the tax for the non-payment of which petitioner was arrested"³⁸ – passed the House and Senate, but

the act as approved by the governor [did] not contain said amendment 34 . . . ; wherefore it is alleged that the bill signed by the governor was not passed by

 $^{^{35}}$ **Id.** at **7, 9.

 $^{^{36}}$ **Id.** at *13.

³⁷**Id**.

 $^{^{38}}$ *Id*.

both houses, and, therefore, is not a law, or if a law in part, is not as to the part under which the petitioner is detained.³⁹

¶38. The Court then set out the precise question to be decided:

Is an act signed by the governor, after having been signed by the president of the senate and the speaker of the house of representatives in attestation of the fact that it had passed both houses, the sole evidence of its contents as passed by both houses . . . ?⁴⁰

¶39. Second, the Court set out three alternative resolutions to the issue. The third view – which the Court ultimately adopted and set out as the law of this State – was

that the enrolled act signed by the president of the senate and the speaker of the house of representatives and the governor is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions.⁴¹

¶40. Departing from our usual practice of avoiding lengthy quotes, we now set forth in substantial part the *Wren* Court's eloquent explanation of why it adopted the view that review of a facially valid legislative act is nonjusticiable:

The third view mentioned above meets our unqualified approval, because it is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands our fullest assent. Every other view subordinates the legislature and disregards that coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law. Every suit before every court where the validity of a statute may be called in question as affecting the right of a litigant will be

 $^{^{39}}$ *Id*.

⁴⁰**Id.**

⁴¹**Id.** at *14.

in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records, and the journals must be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law is to be declared by the court. It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace and statutes declared to be not law as the result of their journalistic history, and the circuit and chancery courts will be constantly engaged in like manner, and this court will, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of statutes thus tested. It is difficult enough often to say what an admitted statute means, and while we would not shrink from the investigation of all questions of fact on the existence of which any statute depends, we decline to review the legislative records to try the regularity of its action as to the manner of exercising its constitutional authority to enact laws, over which its power is as plenary as that of this court as to the manner in which it shall exercise its jurisdiction.

. . .

The fundamental error of any view which permits an appeal to the journals to see if the constitution has been observed in the passage by both houses of their enactments, is the assumed right of the judicial department to revise and supervise the legislative as to the manner of its performance of its appointed constitutional functions. It is the admitted province of the courts to judge and declare if an act of the legislature violates the constitution, but this duty of the courts begins with the completed act of the legislature. It does not antedate it. The legislature is one of the three co-ordinate and co-equal departments into which the powers of government are divided by the constitution, possessing all legislative power and not subject to supervision and control during its performance of its constitutional functions, nor to judicial revision afterward of the manner in which it obeyed the constitution its members are sworn to support. From necessity the judicial department must judge of the conformity of legislative acts to the constitution, but what are legislative acts must be determined by what are authenticated as such according to the constitution.⁴²

¶41. The Court stated that the sound view was

⁴²**Id.** at **16-17.

to regard all of the provisions of the constitution as mandatory, and those regulating the legislative department as addressed to and mandatory to that body, and with which the courts have nothing to do in the way of revision of how the legislature has performed its duty in the matters confided exclusively to it by the constitution.⁴³

¶42. Finally, the Court characterized as "monstrous" and "full of mischief" the notion that "every person on whom the law operates" may "look beyond the enrolled act duly signed as required by the constitution" to see if it was properly passed.⁴⁴ And then, as if responding to one of the arguments presented in dissent today, the Court said

But, it is said, the courts are guardians of the constitution, and if they do not look into the history of legislative doings that department may disregard the constitution as to the manner of passing laws. True, the courts are guardians of the constitution in the performance of their duty to decide causes, and should not shrink from declaring an act of the legislature enacted precisely in the mode prescribed by the constitution void if its provisions violate it; and, on the other hand, the courts should not arrogate the unconstitutional prerogative of reviewing and revising the course of legislative procedure in passing bills in the exercise of its clearly conferred right to pass them by virtue of an instrument containing injunctions binding on it, and sought to be enforced by the oath required of members, and not committed to the courts.⁴⁵

State v. McPhail

¶43. The rule set out in *Wren* has been applied to the executive branch as well. In *State v. McPhail*, this Court stated that executive action must fall within the Constitution and laws of the State, and the facts must be such as to uphold or justify the exercise of the official authority exercised. ⁴⁶ If an officer attempts to exercise an authority not legally vested in him,

⁴³**Id.** at *17.

⁴⁴**Id.** at *18.

 $^{^{45}}$ *Id*.

⁴⁶State v. McPhail, 182 Miss. 360, 180 So. 387, 391 (Miss. 1938).

or attempts to do so when the state of facts does not entitle him to assert authority, such action is subject to judicial review.⁴⁷

¶44. That said, however, the Court must recognize that some actions are of "a purely political nature," and "no writ of injunction or mandamus or other judicial remedial writ will run against the governor" unless personal or private property rights are interfered with. 49

¶45. Here, the attorney general argues that the notice provision is a right reserved to the people – while we think it more likely the notice provision is about the right of the governor to receive complete information before granting a pardon. But even if the attorney general is correct that the publication provision confers a right to notice on the public, that right inures to the benefit of the public in general, and not to any particular private person. We are mindful that the victims and their families are entitled to be interested in the subject matter of this case, and they are undoubtedly – and understandably – concerned with its outcome. But no party stands before this Court claiming a violation of his or her personal or private property rights. The attorney general brings this claim on behalf of the State of Mississippi, and no particular individual. So, under *McPhail*, the exercise of the pardon power – vested solely with the governor – is of "a purely political nature." ⁵⁰

Montgomery v. Cleveland

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⁴⁸**Id**.

⁴⁹**Id**.

 $^{^{50}}$ *Id*.

- ¶46. As stated earlier, the issue before us is not whether the thirty-day-notice provision must be complied with it must. Instead, the question to be resolved today is *which branch* has the final reviewing authority over whether the publication procedure was met.
- ¶47. In *Montgomery v. Cleveland*, this Court addressed Section 124 and stated in unequivocal terms that the governor

Is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, and no other department of the government has any control over his acts or discretion in such matters.⁵¹

And in *Pope v. Wiggins*, this Court elaborated:

Under § 124 of the Constitution of 1890, the power to grant pardons and to otherwise extend elemency, after the judicial process whereby one has been convicted of a crime has come to an end, is vested in the governor alone. . . . This power is *not limited by any other provision* of the State constitution, nor can the same be limited or restricted by either of the other two principal departments of the state government in the absence of a constitutional amendment so authorizing. ⁵²

¶48. The attorney general and the justices in dissent correctly argue that Section 124 places three limitations on the pardon power: (1) the Senate must consent to a pardon for treason; (2) no pardon shall be granted before conviction; and (3) a felon requesting a pardon must publish a petition for thirty days before the pardon shall be granted. While we agree that Section 124 places these limitations on the governor's pardon power, we find these requirements no more compelling than the requirement in *Wren*: Legislative acts presented to the governor for signature must be passed by both legislative houses first.

⁵¹*Montgomery v. Cleveland*, 134 Miss. 132, 98 So. 111, 114 (1923); *see also State v. Kirby*, 96 Miss. 629, 51 So. 811, 812 (Miss. 1910) ("The sole power to pardon is confided by the Constitution to the Governor").

⁵²**Pope v. Wiggins**, 220 Miss. 1, 69 So. 2d 913, 915 (1954) (emphasis added).

- ¶49. And while we agree that the procedures at issue passage by both houses for laws, and publication of notice by pardon applicants are required, the courts may not investigate the inner workings of other branches of government to determine whether those procedural requirements were met.
- ¶50. We again state for clarity that this doctrine of nonjusticiability does not apply when the alleged constitutional defect violates personal or individual property rights. But that distinction has no application here, because the requirement that an applicant for a pardon publish notice to the public in the county where the crime was committed is not any particular individual's personal or property right.
- ¶51. As this Court stated in *Pope*: "[T]he power to grant pardons and to otherwise extend clemency, *after the judicial process whereby one has been convicted of a crime has come to an end*, is vested in the governor alone." As *Pope* suggests, it is *after* conviction when the governor exercises the complete power.

Hunt v. Wright

¶52. *Hunt v. Wright*, decided by this Court less than two years after our adoption of our current Constitution, involved a claim that this Court should declare unconstitutional a revenue bill that was passed during the last five days of a legislative session.⁵⁴ Section 68 of our Constitution states:

⁵³*Id*. at 915 (emphasis added).

⁵⁴*Hunt v. Wright*, 70 Miss. 298, 11 So. 608 (1892).

Appropriation and revenue bills shall, at regular sessions of the legislature, have precedence in both houses over all other business, and *no such bills shall* be passed during the last five days of the session.⁵⁵

¶53. In finding the issue was not justiciable, this Court stated:

While the provision of Section 68 [was] obligatory on the legislature, its disregard of it is beyond the reach of courts, which are not keepers of consciences of legislators, and deal only with what they do, and not what they should have done or omitted.⁵⁶

¶54. This Court's holding in *Hunt* concerning the legislative branch parallels our holding today concerning the executive branch.

Lang v. Board of Supervisors

¶55. In *Lang v. Board of Supervisors*, the claim was that a bill passed by the Legislature did not include the constitutionally required title.⁵⁷ Article 4, Section 71, requires that "[e]very bill introduced into the legislature have a title, and the title ought to indicate clearly the subject-matter or matters of the proposed legislation."⁵⁸ This Court held that, despite the alleged constitutional defect, the sufficiency of the title of a legislative bill is a legislative, not a judicial, question.

¶56. Although we have no previous case on point concerning pardons, we note that the Wyoming Supreme Court has faced this same issue. The Wyoming Constitution granted the governor the power to pardon, but also stated that "the legislature may by law regulate the

⁵⁵Miss. Const. art. 4, § 68 (emphasis added).

⁵⁶*Hunt*, 11 So. at 610.

⁵⁷Lang v. Bd. of Supervisors, 114 Miss. 341, 75 So. 126 (1917).

⁵⁸Miss. Const. art. 4, § 71.

manner in which . . . pardons . . . may be applied for."⁵⁹ And a Wyoming statute required the applicant to publish notice of the application for pardon.⁶⁰

¶57. In *In re Moore*, the petitioner was convicted of grand larceny. ⁶¹ The governor issued a pardon to the petitioner, but the petitioner was held in prison because of insufficient notice of application. The Wyoming Supreme Court held:

The inquiry by a court in a habeas corpus proceeding is merely as to the jurisdiction of the governor. We cannot inquire whether the pardoning power has been exercised judiciously, or whether the proceedings preliminary to the granting of the pardon were irregular, if any such were necessary.⁶²

¶58. The Wyoming Court further stated that the notice provisions were directives on the applicant, and those moving on his behalf. But the governor "might grant a pardon upon his own knowledge, and upon his own motion, without any application or any hearing."

CONCLUSION

¶59. We hold that a facially valid pardon,⁶⁴ issued by the governor – in whom our Constitution vests the chief-executive power of this state, and who is the head of the coequal

⁵⁹Wyo. Const. art. 4, § 5.

⁶⁰Rev. St. Wyo. T. §§ 3367-70.

⁶¹In re Moore, 4 Wyo. 98, 31 P. 980 (1893).

⁶²*Id.* at 982 (internal citations omitted).

⁶³**Id.** at 981.

⁶⁴ Justice Randolph attempts to compare the facially-valid driver's license in *Cousins v. Enterprise Leasing Co.-South Cent., Inc.*, 948 So. 2d 1287 (Miss. 2007) (Dickinson, J, dissenting), to the facially-valid pardons here. We were under the impression in *Cousins* that the Mississippi Department of Public Safety – which is not one of our three branches of government – issued the driver's license. No one in that case suggested that the governor, personally, issues drivers' licenses in Mississippi. Had that fact been established, I would not have dissented.

executive branch of government⁶⁵ – may not be set aside or voided by the judicial branch, based solely on a claim that the procedural publication requirement of Section 124 was not met, or that the publication was insufficient. Our decision is in accord with the separation-of-powers doctrine set forth by the United States Supreme Court in *Marbury v. Madison*; and the *express* separation of powers mandated by the Mississippi Constitution and this Court's precedent in *Wren*, *McPhail*, *Montgomery*, *Wiggins*, *Hunt*, and *Lang*. Accordingly, we reverse and render the decision of the Circuit Court of the First Judicial District of Hinds County and vacate the TRO as extended by the circuit court and this Court, and render judgment here finally dismissing the attorney general's Second Amended Complaint and this action as barred by the doctrine of separation of powers.

¶60. REVERSED AND RENDERED.

CARLSON, P.J., LAMAR, KITCHENS, CHANDLER AND KING, JJ., CONCUR. CARLSON, P.J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., LAMAR AND CHANDLER, JJ. CHANDLER, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY CARLSON AND DICKINSON, P.JJ., AND LAMAR, J. WALLER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH AND PIERCE, JJ. RANDOLPH, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY WALLER, C.J., AND PIERCE, J. PIERCE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY WALLER, C.J., AND RANDOLPH, J.

CARLSON, PRESIDING JUSTICE, SPECIALLY CONCURRING:

¶61. While I wholeheartedly concur with the majority opinion, I am compelled to write in response to the separate opinions in this case. Let me first state that there is a division on this Court in this case because there is a disagreement as to the identification of the critical issue

⁶⁵ Miss. Const. art. 5, § 116 (1890).

confronting this Court today. In my opinion, Presiding Justice Dickinson succinctly states the issue before us in paragraph four of his majority opinion: "[T]he controlling issue is not whether Section 124 requires applicants for pardons to publish notice – it clearly does. The controlling issue is whether the judicial branch of government has constitutional authority to void a facially-valid pardon issued by the coequal executive branch, where the only challenge is compliance with Section 124's publication requirement."

- ¶62. Also, to emphasize the strength of the authority cited by the majority to undergird its position in today's case, I wish to point out the justices' votes in those cases cited by the majority. These cases are in accord with this Court's majority decision today. These cases (and the justices' votes) are as follows (listed in chronological order): *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803) (all justices); *Ex Parte Wren*, 63 Miss. 512, 56 Am. Rep. 825 (1886) (all justices); *Hunt v. Wright*, 70 Miss. 298, 11 So. 608 (1892) (all justices); *In re Moore*, 4 Wyo. 98, 31 P. 980 (1893) (all justices); *Lang v. Bd. of Supervisors*, 114 Miss. 341, 75 So. 126 (1917) (all justices); *Montgomery v. Cleveland*, 134 Miss. 132, 98 So. 111 (1923) (all justices); *State v. McPhail*, 182 Miss. 360, 180 So. 387 (1938) (all justices); *Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954) (all justices); *Nixon v. U.S.*, 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (all justices except Justices White and Blackmon); *Tuck v. Blackmon*, 798 So. 2d 402 (Miss. 2001) (all voting justices except Presiding Justice Banks and Justice Diaz).
- ¶63. Turning now to some of the separate opinions, Chief Justice Waller, in his dissent, states, at least inferentially, that the governor has no right to interpret our state constitution.

Justice Randolph, in no uncertain terms, states that the governor is without authority to interpret our state Constitution.

With the utmost respect for my colleagues in the minority, Chief Justice Waller and Justice Randolph are inconsistent in their application of the tenet that the governor has no authority to interpret the Constitution. They both have seized upon the attorney general's examples given at oral arguments, and his post-argument Rule 28(j) supplementation (see M.R.A.P 28(j)) to point out how former Governor John Bell Williams and former Governor William L. Waller "interpreted" Section 124 of the Constitution by requiring compliance with the publications provisions contained therein. 66 This instance involved the pardoning of Randall Kelly Davis by Governor Williams for one of Davis's crimes, and then Governor Waller's pardoning of Davis on another crime due to the inability of Governor Williams to pardon Davis on the second crime because of Governor Williams's belief that Davis had not complied with the publication provisions of Section 124. Frankly, I am at a loss as to how Governor Williams's actions and Governor Waller's actions concerning the Davis pardons did not involve two governors' "interpretation" of Article 5, Section 124 of our state Constitution.

¶65. Additionally, Chief Justice Waller refers to former Governor Ray Mabus's actions in the pardoning of a convicted burglar by including on the face of the pardon that the pardonee

⁶⁶Justice Randolph adopts by reference Chief Justice Waller's position on the procedures followed by prior governors in granting pardons. While Chief Justice Waller does not use the word "interpret" in discussing the application of Section 124 by Governor Williams and Governor Waller in the pardon case discussed, it is obvious that, in determining whether to grant the pardon at issue, both governors had to lend their "interpretation" to the language of Section 124. In other words, they had to apply the provisions of Section 124 as they understood them.

had published his petition for a pardon as required by the provisions of Section 124 of the state Constitution. Did not Governor Mabus "interpret" Section 124 to require publication as a prerequisite to the granting of a pardon?

- ¶66. And yet, despite the inferred chastisement of former Governor Barbour for having the audacity to offer his "interpretation" of Section 124 in determining the requirements (or lack thereof) necessary to grant pardons, the writers in the minority have relied on former governors' "interpretation" of Section 124 to undergird their position that Governor Barbour's actions were inconsistent with the publication provisions of Section 124. Respectfully, it would appear to me that certain members of this Court have taken the position that, since Governor Barbour's "interpretation" of Section 124 as to the conditions necessary for granting pardons is different from those of Governors Williams, Waller, and Mabus, Governor Barbour is wrong.
- ¶67. If, in reaching our decision in today's case, we are going to take this approach as to taking judicial notice of the actions of former governors in what they required as prerequisites to granting pardons, then I propose that we take judicial notice of what is occurring across the street at the Capitol during the current legislative session concerning legislative action which obviously is in response to the hue and cry brought about by Governor Barbour's last-minute pardons as he left office. I propose that we take judicial notice of the existence of House Bill 36, currently under consideration in the Mississippi House of Representatives. The Title of HB 36 explains:

AN ACT TO PROVIDE THAT WHEN A PERSON CONVICTED OF A FELONY CRIME PETITIONS THE GOVERNOR FOR A PARDON, SUCH PERSON SHALL CONTACT THE DISTRICT ATTORNEY AND SHERIFF

OF THE COUNTY IN WHICH THE FELONY WAS COMMITTED TO SCHEDULE A PUBLIC HEARING REGARDING THE POSSIBLE GRANTING OF THE PARDON; TO REQUIRE NOTICE OF THE PUBLIC HEARING TO BE PUBLISHED IN A NEWSPAPER AND THAT SUCH NOTICE BE PAID BY THE PERSON SEEKING THE PARDON; AND FOR RELATED PURPOSES.⁶⁷

This action by certain legislators would certainly indicate concern over the clarity, or lack of clarity, of the provisions of Section 124, and that the enactment of statutes, and perhaps amendments to the Constitution, are required to prevent what evidently is perceived as a travesty of justice in Governor Barbour's pardoning of individuals without meeting the publication requirements. Could we not take judicial notice of these legislative actions (as some members of this Court have done concerning the actions of former governors) in order to lend guidance to this Court to conclude that Governor Barbour's actions were not inconsistent with the current provisions of Section 124 of the state Constitution?

¶68. In the end, we must do as Presiding Justice Dickinson has done in his majority and calmly and unemotionally consider the language of Section 124, as written, and interpret the plain language of Section 124, without consideration of how such language may have been interpreted and applied by former Governors Williams, Waller, Mabus, or Barbour, or any other governor or governmental official in the executive branch. Nor should we consider what actions the Legislature may be taking in the 2012 Session in response to Governor Barbour's issuance of the pardons in question. But I do agree with my colleagues in the minority that, in the end, it is this Court, and not the executive or legislative branches, which ultimately interprets the provisions of our state Constitution. I rely on their citation of

 $^{^{67}} See\ http://billstatus.ls.state.ms.us/2012/pdf/history/HB/HB0036.xml (last visited Mar. 2, 2012).$

authority to support this proposition. Thus, I could not agree more with Justice Randolph when he states that "[t]he beauty of the Constitution is that, if application of its words causes unintended results, the Constitution provides a remedy: amend it."

- ¶69. I am satisfied that my esteemed colleague, Justice Randolph, is not implying that the justices of this Court who disagree with his position are violating our solemn constitutional oaths. In fact, I agree with Justice Randolph when he states that "[r]egardless of the result, this Court must *enforce* the articles of the Constitution *as written*." (citing *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 652 (Miss. 1998)). (Emphasis in original).
- ¶70. I am firmly convinced that Presiding Justice Dickinson, and those who have joined his majority opinion, have strictly complied with these basic tenets. If our state Constitution in general, and Section 124 in particular, as currently written, has produced unintended results, the people may amend it.
- ¶71. With this being said, I fully join Presiding Justice Dickinson's majority opinion.

DICKINSON, P.J., LAMAR AND CHANDLER, JJ., JOIN THIS OPINION. CHANDLER, JUSTICE, SPECIALLY CONCURRING:

[T]he [judicial] opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislative and executive also in their spheres, would make the judiciary a despotic branch.

- 8 Thomas Jefferson, The Writings of Thomas Jefferson 310 (1897).
- ¶72. As Thomas Jefferson understood, each of the three branches of government is entrusted to decide what laws are constitutional for itself in its own respective sphere of action. This means that each branch is charged with interpreting the procedural provisions

of the Constitution applicable to that branch. This Court is charged with determining what provisions of the Constitution describe powers that are within the exclusive sphere of each branch. *Tuck v. Blackmon*, 798 So. 2d 402, 405-06 (Miss. 2001); *Ex Parte Wren*, 63 Miss. 512 (1886).

¶73. I believe that, under our Constitution, the publication requirements of Article 5, Section 124 are procedural requirements within the executive sphere. They are not a condition precedent to the governor's power to pardon. As so clearly explained in the majority opinion, our Constitution vests in the governor the exclusive power to review the evidence of publication and determine whether the publication requirements have been met. While this Court may review the face of the pardon to determine whether it erroneously was granted before conviction, and the Senate may invalidate a pardon granted for the crime of treason, the Constitution vests in the executive the power to determine whether the publication requirements have been met. Thus, the executive may determine what duration of publication is required – whether daily or weekly, and whether the contents of a published petition were sufficient. The fundamental purpose of Article 5, Section 124 is to gather information for the governor, who all agree is vested with the sole discretion to decide whether to pardon a certain individual. This Court properly exercises its power of judicial review by declaring this procedural provision to be within the executive sphere.⁶⁸

⁶⁸ The dissenting opinion of my learned colleague, Justice Pierce, relies upon the case of *Jamison v. Flanner*, 228 P. 82 (Kan. 1924), that interpreted Kansas' constitution. I find that case to be inapplicable to the separation-of-powers issue before us. Simply put, unlike our constitution, Kansas' constitution vests the pardoning power in the governor subject to legislative restrictions. Kan. Const. art. 1, § 7. Accordingly, in *Pope v. Wiggins*, 220 Miss. 1, 10, 69 So. 2d 913, 916 (1954), this Court recognized that *Jamison* cannot aid our interpretation of Article 5, Section 124, stating that "[*Jamison*] is not applicable to the question now before us, since there is no provision

¶74. While the dissents argue that Article 5, Section 124 is a reservation by the people of a right to thirty days' notice, the notion of such a right dissolves when considered in light of the fact that noticing the public has absolutely no impact on the governor's decision to pardon. All agree that the governor is fully empowered to ignore all protests and grant a pardon in his unfettered discretion.⁶⁹ The plain language of Article 5, Section 124 provides no opportunity to be heard and, contrary to the attorney general's argument, the section creates no due-process right. Akins v. Miss. Dep't of Revenue, 70 So. 3d 204, 208 (Miss. 2011) (stating that "[g]enerally, due process requires notice and a meaningful opportunity to be heard"). There is no evidence that the drafters of the Mississippi Constitution of 1890 actually intended for the publication requirements to reserve a right to the people. In fact, the Journal of the Constitutional Convention and newspapers submitted by the attorney general yield only one statement that could be construed as a statement of intent, which is that "if Governors unwisely exercised the pardoning power, it is for want of information which such publications might furnish." This statement indicates the provision was intended as an information-gathering mechanism for the governor's benefit.⁷⁰

of our Constitution that authorizes the Legislature to restrict and regulate the pardoning power of the governor."

⁶⁹ Counsel for Governor Barbour stated at oral argument that Governor Barbour said that no public comment would have changed his decision to pardon the appellants.

⁷⁰ Article 5, Section 124 prescribes a procedure comparable to this Court's exercise of its constitutional power to promulgate procedural rules governing judicial matters, a power we have held is exclusively within the judicial sphere. *State v. Delaney*, 52 So. 3d 348, 351 (Miss. 2011). This Court's procedure is to publish proposed procedural rules in order to solicit public commentary. But this Court is not bound to incorporate suggestions of the public, and in our discretion, we may consider, adopt, or ignore an individual's suggestion. This publication procedure is an information-gathering mechanism for the Court's own benefit that enables the Court to better exercise its unfettered discretion in adopting procedural rules. No one would argue that our publication of

¶75. As indicated in the majority opinion, if this Court were to hold that the governor's interpretation of the publication requirements of Article 5, Section 124 was subject to judicial review, with our interpretation to apply retroactively, then the Court's ability to invalidate pardons would extend to every pardon that has ever been issued in this State. Every pardoned individual, living or dead, would be subject to an inquiry into whether the publication requirement, as now defined by this Court, was met. The details surrounding the publication of applications for pardons long thought final would be unearthed and subjected to a lengthy judicial review process. The judicial review process for each pardon would take years, from the initial pleadings filed in the trial court to the final decision of this Court on appeal. The lives of those who have been free for years, many of whom probably have no idea whether they published, or whether their individual publication met this Court's interpretation of exactly what constitutes sufficient publication, would be cast into uncertainty and disarray.

¶76. Under the dissents' reasoning, every gubernatorial pardon would be subject to judicial review – not just upon the face of the pardon, but upon evidentiary inquiries into whether the publication requirement was met to the satisfaction of this Court. Even the pardon of Randall Kelly Davis, who was pardoned on May 20, 1974, by Governor Waller, would be threatened by judicial review for compliance with the Court's interpretation of Article 5, Section 124.

proposed rules for public commentary bestows a due-process right on the public; the public has no opportunity to be heard, although individuals may submit commentary to the Court in hopes of persuasion.

Just as publication of proposed rules assists this Court in the exercise of its core power to promulgate procedural rules, the publication requirements of Article 5, Section 124 assist the governor in the exercise of the core executive power of granting or withholding clemency.

This is because, while the pardon states that Davis had "complied with the provisions of Section 124, Article 5, Mississippi Constitution of 1890 by publishing his petition for pardon for the time and in the manner provided thereby," the pardon does not reveal the number of days or weeks the petition was published or the contents of the petition. All Davis's pardon shows is that Governor Waller believed the publication satisfied Article 5, Section 124. Were this Court empowered to review a pardonee's compliance with Article 5, Section 124, then this Court would be empowered to review the specifics of Davis's publication, find that Davis had failed to meet the publication requirements, and invalidate Governor Waller's pardon of Davis. As the face of Davis's pardon demonstrates, Governor Waller determined that Davis's publication was constitutional, and it is not this Court's role to review this decision.

¶77. Our Constitution vests the clemency power in the governor, and the clemency power is a check on the judiciary. The dissents' argument that the Constitution requires this Court's interpretation of the publication requirements of Article 5, Section 124 to override the governor's interpretation would, for all practical purposes, place the clemency power with the judiciary. I believe the majority's analysis is correct, and I fully concur.

CARLSON AND DICKINSON, P.JJ., AND LAMAR, J., JOIN THIS OPINION. WALLER, CHIEF JUSTICE, DISSENTING:

¶78. "Regardless of the result, this Court must enforce the articles of the Constitution as written." *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 652 (Miss. 1998).

¶79. In Article 5, Section 124 of the Mississippi Constitution of 1890, the people⁷¹ of Mississippi gave the governor the power to issue pardons and other forms of clemency. However, the people gave the governor this power only in certain situations. The people did *not* give the governor the power to pardon individuals convicted of treason or impeachment. Miss. Const. art. 5, § 124. The people did *not* give the governor the power, without the consent of the Senate, to remit forfeitures or to grant reprieves to those convicted of treason. *Id.* The people did *not* give the governor the power to pardon an individual before he or she has been convicted of a crime. *Id.* And the people did *not* give the governor the power to pardon a convicted felon until the felon applying for pardon "shall have published for thirty days . . . his petition for pardon, setting forth therein the reasons why such pardon should be granted." *Id.*

¶80. Former Governors William L. Waller Sr. and John Bell Williams demonstrated an understanding of this limitation on the executive power. In 1974, Gov. Waller pardoned Randall Kelly Davis of the crime of "assault and battery with intent." Order from William L. Waller, Governor of Mississippi, Pardoning Randall Kelly Davis (May 20, 1974). On the face of the pardon, Gov. Waller said that Davis had "complied with the provisions of Section 124, Article 5, Mississippi Constitution of 1890 by publishing his petition for pardon for the time and in the manner provided thereby." Id. (emphasis added). Gov. Waller noted that he was pardoning Davis on the recommendation of former Gov. John Bell Williams. *Id.*

 $^{^{71}}$ "All political power is vested in, and derived from, the people." Miss. Const. art. 3, \S 5 (1890).

⁷²In 1992, then-Governor Ray Mabus used identical language on the face of his pardon of a convicted burglar. Exec. Order No. 687 (Jan. 13, 1992).

Gov. Williams, who preceded Gov. Waller, had granted Davis a pardon on a different crime and had commuted his sentence on the assault-and-battery conviction. *Id.* Gov. Waller stated in the pardon that Gov. Williams had intended to pardon Davis for the assault-and-battery conviction, but that he was "prevented" from granting the pardon because Davis had not, at that time, complied with the publication requirements of Section 124. *Id.*

- ¶81. The Constitution is the supreme law in our state, and "[n]o act prohibited by it can be given effectuality and validity." *Chevron U.S.A., Inc. v. State*, 578 So. 2d 644, 648 (Miss. 1991) (quoting *McGowan v. State*, 185 So. 826, 829, 184 Miss. 96, 105 (1939)). The Constitution clearly states that "in cases of felony, after conviction *no pardon shall be granted*" until the applicant for pardon meets the publication requirement. Miss. Const. art. 5, § 124 (emphasis added). Just as the governor does not have the power to pardon an individual before conviction, he does not have the power to pardon a convicted felon before the publication requirement is met. *Id.* "[N]o Governor, or for that matter, any governmental official, can exercise power beyond their constitutional authority." *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 239 (Miss. 2008).
- ¶82. Certainly, no one would argue that a court could investigate and determine the wisdom or propriety of a governor's acts, including pardons. However, the *constitutionality* of a governor's acts, including pardons, *is* a question which the court must determine. This Court has said that, once a governor has acted, "the legality of the act is a judicial question for the courts." *Broom v. Henry*, 100 So. 602, 603, 136 Miss. 132 (1924). It is within this Court's power indeed it is this Court's duty to determine whether the governor, or any government official, has acted outside his or her constitutional authority. *Barbour*, 974 So.

2d at 239; see also **Wood**, 187 So. 2d at 831 ("[T]his Court has the power to construe the Constitution and thus define the powers of the three branches of our Government.").

¶83. For the reasons stated herein, I respectfully dissent.

RANDOLPH AND PIERCE, JJ., JOIN THIS OPINION.

RANDOLPH, JUSTICE, DISSENTING:

Upon the judicial department, because of the nature of its duties, devolves the duty of determining whether in specific instances the other two departments have exceeded the powers granted to them by the Constitution.

Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 803 (1938).

[N]o citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the [acts of another branch], the latter must yield.

Newell v. State, 308 So. 2d 71, 77 (Miss. 1975).

¶84. Today's decision is a stunning victory for some lawless convicted felons, and an immeasurable loss for the law-abiding citizens of our State. Our Constitution and numerous holdings of this venerable institution are turned upon their heads by this Court's relinquishing the inherent judicial function of declaring what the Constitution and our laws say. Today's decision allows some convicted felons to avoid their constitutional obligations and allows a coordinate branch to eschew multiple constitutional obligations and duties, in favor of those convicted felons and in total disregard of substantive constitutional rights reserved by the people of Mississippi. Today's decision refuses to acknowledge that our Constitution provides that "[t]he right of the people . . . [to] petition the government on any subject [including pardons] shall never be impaired[,]" and that "[t]he enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent

in, the people." Miss. Const. art. 3, §§ 11, 32 (1890); see also U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). The people's substantive right to petition the government has been annulled by the majority's refusal to require compliance with Article 5, Section 124, by either the convicted felons or the governor. Absent publication – which provides public notice that a convicted felon is seeking a pardon – the general public is silently and blindly cordoned off from the mansion and office of the governor, left unaware that its right to petition the government slowly disappears, before completely vanishing once pen touches paper. By not recognizing the rights of the people proclaimed in Article 3, Sections 11 and 32, my esteemed colleagues fail to discern this immeasurable harm.⁷³

¶85. Today's decision contravenes the text of the Constitution;⁷⁴ fails to abide by this Court's 1924 holding that a pardon petition "is required by law to be published before the pardon therein prayed for can be granted[;]"⁷⁵ denies that these pardons are reviewable,

⁷³ Lest we in government forget, let it be declared again: "All political power is vested in, and derived from, the people; all government of right originates with the people, and is founded upon their will only, and is instituted solely for the good of the whole[,]" and "[t]he enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people." Miss. Const. art. 3, §§ 5, 32 (1890); see The Declaration of Independence ¶ 2 (U.S. 1776) (describing the people's "separate and equal station to which the Laws of Nature and of Nature's God entitle them" and providing that "Governments are instituted among Men, deriving their just powers from the consent of the governed").

⁷⁴ See Miss. Const. art. 3, §§ 11, 32; art. 5, § 124 (1890).

⁷⁵ Grantham v. Wilkes, 135 Miss. 777, 100 So. 673, 674 (1924).

despite review of prior pardons by this Court;⁷⁶ fails to consider decisions of other states;⁷⁷ fails to consider legal encyclopedias confirming that conditions precedent to granting a pardon have repeatedly been found reviewable;⁷⁸ contradicts learned treatises and legal encyclopedias on Mississippi law;⁷⁹ and fails to consider that the United States Supreme

⁷⁶ See **Pope v. Wiggins**, 220 Miss. 1, 69 So. 2d 913 (1954); **Montgomery v. Cleveland**, 134 Miss. 132, 98 So. 111 (1923).

⁷⁷For example, see **People ex rel. Garrison v. Lamm**, 622 P. 2d 87 (Colo. Ct. App. 1980), which has factual similarities to Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60 (1803), and legal similarities to *Cleveland*. In the absence of the governor, the lieutenant governor signed a pardon (see Cleveland, 98 So. at 114). Garrison, 622 P. 2d 87. The governor, upon return to his office, refused to deliver the signed document (see Marbury, 5 U.S. at 177), and the putative pardonee demanded delivery to effect his pardon. Garrison, 622 P. 2d at 87. The governor argued that the conditions precedent to obtaining a pardon had not been met, and, therefore, that it was void. Id. The Colorado court considered the arguments (pro and con) but did not declare it nonreviewable. Rather, it considered the applicable constitutional provisions (as should be done in this case, for this is what courts do). Id. The court determined that, under the existing law, the condition precedent to issuing the pardon had not occurred (as, for some, in today's case), and declared the pardon void. Id. See also State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 518, 644 N. E. 2d 369, 373 (1994) (Ohio court found that "a purported pardon is not really a pardon at all if constitutionally authorized procedural limitations on the pardoning power are ignored" and "[a]n attempted pardon that is granted without adherence to constitutionally authorized requirements is invalid and is not immune to challenge."); Gulley v. Budd, 209 Ark. 23, 29 189 S.W. 2d 385, 388 (1945) ("We are without power to review the Governor's discretion in issuing this pardon" but "we may consider . . . the Governor's power to act."); Jamison v. Flanner, 228 P. 82, 99 (Kan. 1924) (Kansas court found that "[t]he Governor, ... simply by virtue of his office as such, takes no power touching pardons. ... He derives his power from the Constitution and laws alone[,]" and "the loose notion which sometimes prevails that the pardoning power is an executive power, to be exercised by the Governor in his discretion, and that no other official or department of the government can interfere with it . . . is so only when made so by the Constitution.") (citation omitted).

⁷⁸ See 59 Am. Jur. 2d Pardon and Parole § 23 (2002) ("The person or body in whom the [pardoning] power is vested has only the authority conferred by the constitutional provision, and such power may be exercised only in the cases and in the manner prescribed") (emphasis added); C.J.S. Pardon and Parole § 10 (2002) ("The pardoning power of a governor . . . is subject to restrictions contained in the constitutional provision granting the power"); Judicial Investigation of Pardon by Governor, 65 A.L.R. Pardon 1471 (1930) ("All of the cases agree that judicial authority extends to the determination of whether, in a given case, the pardoning power has been validly exercised.") (emphasis added).

⁷⁹ See Jeffrey Jackson & Mary Miller, 3 *Encyclopedia of Mississippi Law* § 19:123, 168-69 (2001) ("[b]efore the governor may pardon a person convicted of a felony, the applicant must have

Court has reviewed whether pardons were within the President's power on numerous occasions. Of Given such great weight of authority, and the majority's acknowledgment that publication is required by Section 124 (Maj. Op. at ¶¶ 4, 49), the majority's acquiescence to this untenable accretion of judicial authority to the executive branch is simply perplexing. ¶86. Even given this overwhelming authority, the plain language of the text, Article 5, Section 124, still must control our decision, for this Court must declare the Mississippi Constitution as it is written, not as we assume it to be. See Pro-Choice Mississippi v. Fordice, 716 So. 2d 645, 652 (Miss. 1998) ("Regardless of the result, this Court must enforce the articles of the Constitution as written.") (emphasis added). As wisely penned by a dissenting justice in the infamous Dred Scott case:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the

published a petition for pardon for 30 days, 'setting forth the reasons why such pardon should be granted.""); George H. Ethridge, *Mississippi Constitutions* (1928) (the governor's "power to grant pardons is full and complete *when the conditions imposed by the Constitution are complied with.*") (emphasis added). Ethridge served on this Court from 1916 until 1941, during which time several cases cited by the majority and dissents were decided.

President of the United States were within the authority conferred by the federal constitution, even though the President's pardoning power is limited only by an inability to pardon in cases of impeachment. See U.S. Const. art. 2, § 2; Schick v. Reed, 419 U.S. 256, 264 (1974) (finding that "the conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute."); Biddle v. Perovich, 274 U.S. 480, 487 (1927) (addressing whether a commuted sentence "was authorized by law . . . within the scope of the words of the Constitution, article 2, s 2"); U.S. v. Wilson, 32 U.S. 150, 161, 8 L. Ed. 640 (1833) (a pardon "may be controverted by the prosecutor, and must be expounded by the court). If the broad pardoning power of the federal constitution has been subjected to judicial review by the highest court in the land, cannot the more limited pardoning power of the Mississippi Constitution fairly be subject to judicial review as well?

time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Scott v. Sandford, 60 U.S. (19 How.) 393, 621, 15 L. Ed. 691 (1857) (Curtis, J., dissenting).

¶87. The pertinent provision of the text committed for our consideration reads as follows:

in cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days . . . his petition for pardon, setting forth therein the reasons why such pardon should be granted. $[^{81}]$

Miss. Const. art. 5, § 124 (1890) (emphasis added) (see Maj. Op. at ¶ 2 for the full text of Section 124).

I. This Court has the power, authority, duty, and responsibility to consider this case.⁸²

¶88. Article 1, Section 2 reads that no person belonging to any branch of government "shall exercise any *power properly belonging* to either of the others." Miss. Const. art. 1, § 2 (1890) (emphasis added). The ultimate power and responsibility for interpreting our Constitution is bestowed upon the judiciary, and that responsibility is the crux of the dispute now before us. *See Barbour v. Delta Corr. Facility Auth.*, 871 So. 2d 703, 710 (Miss. 2004)

⁸¹ That Section 124 does not confer an absolute pardoning power on the Mississippi governor plainly can be seen. The governor has: (1) no power to grant a reprieve for treason or remit a forfeiture, without consent of the Senate; (2) no power to grant a pardon before conviction; and (3) no power to pardon a convicted felon until thirty-days' publication has occurred. Miss. Const. art. 5, § 124.

In contrast, an example of absolute pardoning power is found in the North Dakota Constitution, which provides that "[t]he governor may grant reprieves, commutations, and pardons. The governor may delegate this power in a manner provided by law." N.D. Const. art. 5, § 7.

⁸² Any time a court has the power, authority, duty, or responsibility to do something, the issue is justiciable. The term "justiciable" refers to a court's ability to hear a case. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 493 (2d ed. 1995) (defining "justiciable" as "susceptible of judicial decision; triable").

("As the highest state court, this Court has the proper authority and responsibility to interpret the Mississippi Constitution of 1890."); *Alexander v. Allain*, 441 So. 2d 1329, 1333 (Miss. 1983) ("The interpretation of the constitution becomes the duty of the judicial department when the meaning of that supreme document is put in issue."); *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). "Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained." *Marbury*, 5 U.S. at 179.

¶89. Our Constitution limits the pardoning power of the governor. See Miss. Const. art. 5, § 124 (1890). In the absence of publication, a pardon is outside the scope of the governor's authority. (See infra, Section II). An act of a governmental officer outside the scope of his authority is justiciable. See Fordice v. Bryan, 651 So. 2d 998, 999, 1003 (Miss. 1995) ("In interpreting various provisions of our constitution, we are called upon to declare the boundaries beyond which executive action may not pass" and "we will not question his judgment in lawfully exercising his . . . power, but we must be available to adjudicate the question whether the manner of its exercise exceeds constitutional parameters.") (emphasis added); State v. Wood, 187 So. 2d 820, 831 (Miss. 1966) ("this Court has the power to construe the Constitution and thus define the powers of the three branches of our Government."); Albritton, 178 So. at 803 ("Upon the judicial department, because of the nature of its duties, devolves the duty of determining whether in specific instances the other two departments have exceeded the powers granted to them by the Constitution."); Broom

v. Henry, 136 Miss. 132, 100 So. 602, 603 (1924) ("when [the governor] has acted, . . . the legality of the act is a judicial question for the courts."); 59 Am. Jur. 2d Pardon and Parole § 44 (2002) ("the courts have jurisdiction to determine the validity of a pardon, as affected by the question whether the official granting it had the power to do so."). The majority concedes this truth, providing that "[i]f an officer attempts to exercise an authority not legally vested in him, or attempts to do so when the state of facts does not entitle him to assert authority, such action is subject to judicial review." (Maj. Op. at ¶ 43) (citing State v. *McPhail*, 182 Miss. 360, 180 So. 387, 391 (1938)). See also Maj. Op. at ¶ 23 ("the judiciary does possess the power to review . . . executive action exceeding constitutional limits ") (citing Nixon v. U.S., 506 U.S. 224, 238, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)). Thus, this case presents a justiciable question – whether the governor had the constitutional authority to grant all of these pardons, in the absence of compliance by some of the putative pardonees with the textually-committed limitations established by the Constitution for a pardon to be granted.

¶90. Our predecessors have provided a blueprint for us to perform this task, providing that we must:

test this [dispute] by the touchstone of the constitution of the state. This is the only proper, legal and safe criterion by which it can be judged and decided upon. In doing so, we must be careful to allow no hypothetical interpretations, or equivocal definitions of the explicit text of this instrument. It is a compact between the people and their officers. There are restraints placed upon both. Power to govern has been confided, but it has also been limited and restricted. It remains then to examine whether the exercise of power in the case now under consideration, is within the constitution and laws of this state.

Ex parte Hickey, 12 Miss. 751, 779, 1845 WL 1999, at *13 (1844) (emphasis added). Significantly, the United States Supreme Court has specifically found that the review of pardons is justiciable, stating that a pardon:

may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show, that this, like any other deed, ought to be brought "judicially before the court, by plea, motion or otherwise."

Wilson, 32 U.S. at 161. Similarly, when the State controverts a pardon, as here, the courts have a duty to expound upon it.

¶91. Hooker, *et al.*, and amicus assert that the Court should blink, wink, and nod at the putative pardonees' failure to follow the explicit language of the Constitution. To now do so, because the executive branch chose to, is an act of judicial timidity of the highest (or is it the lowest?) order. Can these putative pardonees ignore the Constitution? The Constitution says no. Can the governor ignore the Constitution? The Constitution says no. Does the executive branch possess the right to deny and impair substantive rights "retained by, and inherent in, the people"? *See* Miss. Const. art. 3, § 32 (1890). The Constitution says no. Does the executive branch possess the right to waive the people's substantive right to "petition the government on any subject"? *See* Miss. Const. art. 3, § 11 (1890). The Constitution says no. ¶92. The majority relinquishes the constitutional question to the governor, and then concludes that the governor's decision is not reviewable by a court. *See* Maj. Op. at ¶¶ 5, 27, 45. Where does the Constitution impart to the governor the power to be the sole judge of the validity or legality of his actions? There is no textual commitment to the executive branch

for the interpretation of the Constitution. 83 This Court lacks the authority to cede power bestowed upon it by the people, or to sponsor an accretion of this power to the executive branch. Such shifting of constitutional authority and duty can be done only by constitutional amendment. 84 Indeed, *McPhail*, cited by the majority, disapproved of subordination to a coordinate branch. *See McPhail*, 180 So. at 391 ("If any officer, be he high or low, attempt to exercise an authority not legally vested in him, . . . his action thence is as much the subject of judicial review and remedial rectification as is the action of any private person.").

¶93. The executive branch cannot nullify, negate, or ignore the Constitution or usurp the role of the judiciary in interpreting it. The people empowered the judiciary with the interpretation of our Constitution, to objectively declare if the Constitution has been ignored or trampled upon. To abdicate or concede the inherently judicial function of interpreting the Constitution to the executive branch is neither wise, prudent, nor constitutionally permissible. Such concession defies the Constitution and blatantly avoids the expectations of those who elected us to perform our duties. The Court should never shirk its responsibility to exercise the powers entrusted to it by the people. It is a violation of the sacred trust the framers of that

⁸³ Nor has the extent of the governor's constitutional power been textually committed to the governor, as the majority maintains. The judicial department, not the executive, has the "duty of determining whether . . . [the executive] ha[s] exceeded the powers granted to [him] by the Constitution." *Albritton*, 178 So. at 803. And the Constitution provides that the governor has no power to pardon a convicted felon "until . . . the applicant therefore shall have published for thirty days" Miss. Const. art. 5, § 124 (1890).

⁸⁴ The beauty of the Constitution is that, if application of its words causes unintended results, the Constitution provides a remedy: amend it. *See* Miss. Const. art. 3, § 6 (1890) ("The people of this state have the inherent, sole, and exclusive right to . . . alter and abolish their constitution . . . whenever they deem it necessary to their safety and happiness"). But it is not proper or lawful to disregard or ignore its mandates.

great document placed in those who have served, serve, and will serve on this Court. Granting the executive branch the sole authority to decide the legality or validity of its actions and declaring its decision nonreviewable eviscerates the Constitution and jeopardizes the rights of every citizen.

II. The governor lacked authority to pardon any convicted felon until after publication.

¶94. Our Constitution bestows the power to pardon upon only one – the governor. Miss. Const. art. 5, § 124 (1890). The putative pardonees would stop the inquiry there. But the pardoning power exists only to the extent that the people have constitutionally granted it. See Whittington v. Stevens, 221 Miss. 598, 603, 73 So. 2d 137, 139 (1954) ("The power [to pardon is one inherently vested in the people, who, by constitutional provision, may vest it where they choose."); Schick, 419 U.S. at 267 ("the pardoning power is an enumerated power of [a] Constitution and . . . its *limitations*, if any, must be found in [a] Constitution itself.") (emphasis added); Montgomery v. State, 163 So. 365, 368 (Ala. 1935) (it is only "where the pardoning power is conferred on the executive without express or implied limitations [that] the grant is exclusive") (emphasis added) (citation omitted); State v. Shumaker, 164 N. E. 408, 409 (Ind. 1928) ("[A]ll sovereign power is vested in the citizens of the state; and the citizens have the power, by virtue of such sovereignty, to do whatever, whenever, they please, except by their own limitation as expressed in the highest law that may emanate from the sovereign power, the Constitution.") (emphasis added); 59 Am. Jur. 2d Pardon and Parole § 15 (2002) ("Under the American form of government, the pardoning power is neither naturally nor necessarily an executive power. It is a power of government inherent in the people, who, by constitutional provision, may vest it, *in whole or in part*, in any official, board, or department of government they so choose.") (emphasis added). Constitutional *limitations* upon, or *conditions precedent* to, exercise of the pardoning power either prohibit or *restrict the effectual validity of a pardon. See Chevron U.S.A., Inc. v.*State, 578 So. 2d 644, 648 (Miss. 1991) (providing that the Constitution is the supreme law in our state, and "[n]o act prohibited by it can be given effectuality and validity.") (citation omitted). Only in the *valid* exercise of *conferred power* is the governor "the sole judge of the sufficiency of the facts and of the propriety of granting [a] pardon" *Cleveland*, 98 So. at 114.

¶95. Hooker, et al., confirm that the "[c]onstitutional text dictates the result." We cannot know with certitude the framers' intent in placing limitations in the text of the Constitution, but we can with certitude view the express words used in the framers' textual commitment to publication, and know with certitude that the Constitution means what the words say. See McPhail, 180 So. at 389 (constitutional and statutory provisions "mean what is in the ordinary import of the language used"); Lee v. Mem'l Hosp. at Gulfport, 999 So. 2d 1263, 1270 (Miss. 2008) (Dickinson, J., dissenting) ("judges are without constitutional authority to waive or diminish constitutionally-enacted . . . requirements. Instead, . . . requirements which are not open to interpretation as to quantity or quality . . . must be complied with, and no analysis is needed."). Mississippians did not bestow upon the governor an unconditional grant of authority to pardon. Section 124 expressly limited the authority to pardon in three ways: (1) the governor has no power to grant reprieves to those convicted of treason or to remit forfeitures, without the consent of the Senate; (2) the governor has no power to grant

The publication requirement serves a real purpose: it discourages and impedes furtive, surreptitious actions from remaining undisclosed to the public until after the act is complete, leaving no avenue for the people to petition the government (a right those pesky people reserved unto themselves in Article 5, Section 124 and in Article 3, Section 11). In requiring public notice before empowering the governor to pardon, the people of Mississippi demanded transparency in the process, more than a century before "transparency" became a political buzzword. If a convicted felon, by his efforts or by the efforts of others, hopes to be the beneficiary of the people's mercy through the governor's act, he *shall*, by publication, give the public thirty-days' notice before the governor can decide to extend mercy, *vel non*, on behalf of the sovereign (the people). This notice serves to foment public discourse and to insure that the governor can be fully informed, by all interested persons, of the pros and cons of granting a pardon. Once thirty-days' publication has run, then (and only then) the governor has the authority to pardon, and his decision – be it right, wrong, or for no reason at all – is not subject to judicial review.

⁸⁶ See Black's Law Dictionary 863 (9th ed. 2009) (defining in posse as "[n]ot currently existing, but ready to come into existence under certain conditions in the future; potential.").

⁸⁷ See Black's Law Dictionary 846 (9th ed. 2009) (defining *in esse* as "[i]n actual existence; in being.").

¶96. No party has had the temerity to argue that a pardon for treason or impeachment could be granted without Senate approval or that the governor could issue a pardon before a conviction, and that neither unconstitutional act could be judicially reviewed. Yet some convicted felons argue that the third limitation – "no pardon shall be granted" – does not preclude the governor from issuing pardons (despite that the publication requirement was not met). They further argue that, because judicial review for the legality, vel non, of the pardon is not specified in Section 124, a legal challenge to the pardon is unreviewable by the judiciary. Both arguments are untenable. Just as the governor has no constitutional authority to grant a pardon before a conviction, the governor has no constitutional authority to grant a pardon to a convicted felon until the convicted felon has published for thirty days. No citation is required for the general principle that excising a provision from – and reading nonexistent language precluding judicial review into – Section 124 violates all tenets that govern constitutional interpretation.

⁸⁸ Would extending the majority's contention that the power to pardon has been "textually committed to another branch of government" and is "nonjusticiable[,]" mean that even preconviction pardons or preconsent of the Senate pardons are nonjusticiable? (Maj. Op. at ¶ 25). If so, today's holding supports an unacceptable accretion of power and defies our body of law that "no governor . . . can exercise power beyond [his] constitutional authority." *Barbour*, 974 So. 2d at 239. If not, then why are these pardons treated differently?

Barbour v. Berger, Order - Case #2008-M-01534-SCT, at 9 (Sept. 18, 2008) ("once the Governor and Secretary of State act, their decisions and actions are then subject to judicial review."); Barbour v. State. ex rel. Hood, 974 So. 2d 232, 239 (Miss. 2008) ("no governor . . . can exercise power beyond [his] constitutional authority."); Broom, 100 So. at 603 (we may not command the governor to act, "yet, when he has acted . . . the legality of the act is a judicial question for the courts.").

¶97. The majority relies heavily on a facial-validity analysis. ⁹⁰ If facial validity is indeed the test, where is the authority and caselaw showing that facial validity constitutes conclusive proof that a pardon is valid, or that it constitutes anything more than a rebuttable presumption of validity? Indeed, the facial validity, *vel non*, of a pardon should not control our decision, and no authority is cited for this proposition. ⁹¹ While "pardons are to be liberally construed in favor of the pardonee," and there is a presumption in favor of the validity of the pardon[,]" that presumption may be rebutted by proof "that the pardon was illegal." *Gulley*, 189 S.W. 2d at 390 (citing *Horton*, 279 S.W. at 1021). Such a rebuttable presumption refutes the majority's contention that facial validity necessarily mandates nonjusticiability. Taking the

⁹⁰ In Cousins v. Enterprise Leasing Co.-South Cent., Inc., 948 So. 2d 1287 (Miss. 2007), Justice Dickinson's dissent scoffed at the notion that a facially valid driver's license was proof of being "then duly licensed." Id. at 1292 (Dickinson, J., dissenting) (citation omitted). Today we should likewise scoff at the notion that a facially valid pardon is dispositive proof of its substantive legality. The sagacious analysis of Justice Dickinson in *Cousins* should guide our analysis. "[T]he majority ipso facto considers a person who possesses an invalid driver's license [pardon] that appears valid to be 'then duly licensed' [pardoned]." Id. at 1293 (Dickinson, J., dissenting). "I fail to follow the majority's logic in finding that a person who does not hold a valid driver's license [pardon] is nonetheless 'duly licensed' [pardoned] simply because that person presented an invalid license [pardon] that was 'facially valid." Id. "With all due respect to the majority, its decision today injects an exception [standard] into Section 63-1-67(1) [Section 124], and thus represents an amendment to, rather than an interpretation of, the statute [constitutional provision]." *Id.* at 1294. "We must respect the wording selected by the Legislature [the people], even though we might believe the statute [constitutional provision] to be impractical, unworkable, or unwise." *Id*. Section 124 neither states nor implies that the facial validity, vel non, of a pardon is the touchstone for deciding this dispute.

⁹¹ While the majority relies on *Ex Parte W.V. Wren*, 63 Miss. 512, 1886 WL 3462 (1886), that is not a pardon or executive-order case; it regarded the validity of bills passed by the Legislature. *Wren* is further distinguishable, for the reasons provided in ¶¶ 32-35, *infra*.

majority's position to its logical extreme, would this Court deem a facially valid pardon procured by fraud irrebuttable and nonjusticiable?⁹²

¶98. Furthermore, applying the majority's facial-validity approach to an attempted land transaction highlights the inherent weakness of that approach. The governor could execute a facially valid deed transferring Blackacre, but if the government does not own Blackacre, the facially valid deed is meaningless, a nullity, and void *ab initio*, for the governor could not convey property not owned by the government. Is the deed enforceable because it is facially valid? A governor could circumvent any limitation of Section 124 by using artful language on the face of a pardon. For example, a governor could issue a pardon reading: "I, Governor X, hereby pardon John Doe of [the specified crime]." There is nothing on the face that exhibits invalidity. But what if the pardon was issued prior to John Doe's conviction? In order to test the validity of the pardon, a court would necessarily have to look beyond its face. ⁹⁴ Would we not enforce the condition precedent that "no pardon shall be granted before conviction"? If so, why should the condition precedent that "no pardon shall be granted until the applicant therefore shall have published" receive special dispensation?

¶99. This Court has unequivocally declared, and the majority agrees, that publication *is* required by Section 124. *See Grantham*, 100 So. 673; (Maj. Op. at ¶¶ 4, 49). In *Grantham*,

⁹² Under the majority's analysis, could the defrauded governor not contest the pardon, because the issuance of a pardon is an official act on behalf of the people, rather than a personal or private act, such that there would be no "justiciable violation of a personal right"? (Maj. Op. at ¶ 1).

⁹³Such comparison is quite *apropos*, since Chief Justice Marshall compared delivery of a pardon to delivery of a deed in *Wilson*. *See Wilson*, 32 U.S. at 161.

⁹⁴ The same would be true if John Doe was convicted of treason or impeachment, and a pardon was issued without the advice and consent of the Senate.

a newspaper published a pardon petition for Jeff Lacy, which claimed as grounds for the pardon that Lacy had been convicted entirely upon on Grantham's unreliable, untrustworthy testimony, and Grantham sued the newspaper for libel. Id. The Court considered the parties' agreement "that said Jeff Lacy had a right to have a petition for pardon prepared and published in the furtherance of his application for a pardon, and ... that, without publication of the petition for pardon, no pardon could be granted to him." Plaintiff's Replication to Defendants' Second Plea (on file at Mississippi Department of Archives and History). In ruling upon the issues presented, this Court found that "Section 124... requires all petitions for the pardon of a felon to be published" and that "it is required by law to be published before the pardon therein prayed for can be granted...." Grantham, 100 So. at 673-74. The Court's ruling in Grantham should control our decision today.

¶100. Hooker, *et al.*, and the amicus argue that publication is not required. Indeed, only the former Governor and some convicted felons whose putative pardons are at risk have argued that publication is not necessary, and that the governor has the unprecedented authority, heretofore reserved for the judiciary, to interpret the Constitution. ⁹⁶ Our body of law refutes their contention, as, indeed, for more than eighty years, no one has questioned that the

⁹⁵ After his petition was properly published, the governor issued Lacy a pardon. *See* Brief for Appellees (on file at Mississippi Department of Archives and History).

⁹⁶ For the mansion-trusty pardons, the Governor did not make a *decision as to whether publication was made*, but rather adopted the position taken by the putative pardonees, that he has the authority to interpret the Constitution and *declare publication unnecessary altogether*. In other words, "we are not dealing here with a question of whether information provided in response to the requirement is substantial enough[,]" but whether it is constitutionally permissible to "provide[] nothing at all in response to the . . . requirement." *Lee*, 999 So. 2d at 1269 (Dickinson, J., dissenting).

publication requirement must be met before a convicted felon may be pardoned. The doctrine of *stare decisis* dictates this result.

¶101. Additionally, although historical acceptance of this truth by custom and practice – and recognition, acceptance, and support of the same truth by every source we can identify – is not binding, it certainly is instructive. One year before *Grantham*, in *Cleveland*, a case relied upon by the putative pardonees, a pardon was issued by the lieutenant governor. *Cleveland*, 98 So. at 111. It was challenged on the ground that the lieutenant governor did not have the constitutional authority to grant pardons and, thus, the legality of the pardon was at issue. Id. Had the petition not been properly published, the governor challenging the pardon granted by the lieutenant governor assuredly would have raised such invalidity to defeat the pardon. Instead, the parties agreed and stipulated that the convicted felon had properly published his pardon petition, and further that the petition "with publication properly proved was on file in the office of the Governor of the State of Mississippi."97 Id. In stipulating that proper publication occurred, the parties communicated their understanding that publication was required, for a stipulation serves no purpose other than that the fact stipulated to is relevant to the resolution of the case. The Court relied upon the stipulation and, by noting it in its opinion, implicitly found publication necessary – the view it stated explicitly the following year in Grantham. See Grantham, 100 So. at 674. Not only did the lieutenant governor and the governor in *Cleveland* recognize that proper publication was essential, but other governors also have recognized and acted upon the publication requirement, as addressed in

⁹⁷ Such evidence has not been stipulated or proven by Hooker *et al.*, for the governor says that no files exist for the mansion trusties.

Chief Justice Waller's dissenting opinion. Thus, both the judicial and executive branches, as well as pardonees, historically have recognized that Section 124's limitation must first be complied with before the governor has the authority to pardon. This is consistent with the position of disinterested legal scholars, who have written that "[b]efore the governor may pardon a person convicted of a felony, the applicant must have published a petition for pardon for 30 days, 'setting forth the reasons why such pardon should be granted.'" Jackson & Miller, 3 *Encyclopedia of Mississippi Law* § 19:123, at 168-69.⁹⁸

¶102. Furthermore, the publication requirement is still recognized by the executive branch, save for the former chief executive. The Mississippi Department of Corrections (MDOC), which is part of the executive branch, advised the governor's office that publication was required. *See Delta Corr. Facility Auth.*, 871 So. 2d at 712 ("Clearly the MDOC is a department of the executive branch."). The State Parole Board, whose members are appointed by and serve "at the will and pleasure" of the governor, advised Aaron Brown's wife, Etinika Brown, that publication was required. Miss. Code Ann. § 47-7-5(1) (Rev. 2011).

¶103. Finally, other parties to this proceeding have recognized and complied with the publication requirement. In his habeas corpus petition, Azikiwe Kambule pleaded that "[p]ursuant to Section 124, no person convicted of a felony may be pardoned by the Governor unless, as a condition precedent, the applicant's petition for pardon is published by a newspaper for thirty days prior to issuance of the pardon[,]" and pleaded that he had

⁹⁸ The putative pardonees cited Jackson, at page 168, in their briefs to support their argument, but omitted the above-quoted sentence, which directly follows, appearing on page 169.

was convicted for a period of thirty days." Joshua Howard filed a special appearance in circuit court, likewise pleading that he had "followed all constitutional guidelines including correctly publishing in the county where he was convicted for a period of thirty days." ¶104. The four mansion trusties appearing, in their brief, correctly recognize that the text of the Constitution dictates the result.99 Nonetheless, they argue that the publication requirement applies only when a convicted felon is an "applicant" for a pardon, and "there is no need for an application and no need for publication." 100 But the contention that some did not apply for a pardon and, therefore, were not required to publish notice, defies the constitutional requirement that a petition be made, and publication had. Absent either, no pardoning power exists. Such contention not only defies the Constitution, but also logic, reason, and common sense. "[T]o exempt the Governor from the . . . clause would allow the Governor to circumvent the . . . safeguards for which the clause was adopted, rendering the clause meaningless." *Maurer*, 644 N. E. 2d at 374. Under the putative pardonees' argument, if the governor wished to grant a pardon to a convicted felon who applied, but failed to meet the publication requirement, then he could simply grant the pardon, argue that the applicant

"followed all constitutional guidelines including correctly publishing in the county where he

⁹⁹ The brief was filed on behalf of four mansion trusties: Hooker, Gatlin, Kern, and McCray. A fifth trusty, Ozment, has never appeared in these proceedings.

The majority's finding that "it fell to the governor, alone, to decide whether the Constitution's publication requirement was met" must fail as to these putative pardonees, for they and the Governor assert it was not required, a rather dubious claim, as they later published, but not within the thirty-day requirement. (Maj. Op. at ¶ 5). The mansion trusties expressly contend that "their pardons are in no way affected by any purported failure to comply with the 30-day notice provision." In cases where the absence of publication is undisputed, there is no contested fact to "decide." That is, one cannot "decide" whether or when the thirty-day "publication requirement was met[,]" when it is undisputed by those concerned that the event did not occur.

had not applied, and circumvent the Constitution entirely. Even if we were to accept such a dubious proposal, the position must fail, based on this Court's long-established precedent. In *Grantham* – the only other time this Court has construed the publication requirement – we found that publication was required, but that the convicted felon for whom a pardon was sought did not have to be the one to file and sign the pardon petition. Grantham, 100 So. at 674. The pardon petition for Jeff Lacy, which gave rise to the libel claim in *Grantham*, was submitted by "undersigned citizens of Harrison County, Mississippi[,]" and did not include Lacy. Petition for Pardon of Jeff Lacy (on file at Mississippi Department of Archives and History). This Court considered argument that "[n]either the constitution nor statute requires the convict to sign his petition for pardon. He is not free to act for himself and in many cases it is only through others that he can act in the preparation and publication of his petition." Brief for Appellees, at 11 (on file at Mississippi Department of Archives and History). The Grantham Court concluded that Section 124 "does not expressly require a petition for a pardon to be signed by the person for whom the pardon is requested, nor is such a requirement necessarily implied by the use of the words 'his petition,' for when signed and presented for the petitioner by others it becomes as much his petition as if he had signed and presented it himself." Grantham, 100 So. at 674 (emphasis added). Thus, Section 124 does not impose the publication requirement only when a convicted felon is an "applicant," but in all instances.

¶105. In the absence of constitutional power to grant the pardons, the governor's extra-vires acts are ineffectual and void. *See Chevron*, 578 So. 2d at 648 (the Constitution is "the highest known law" and "[n]o act prohibited by it can be given effectuality and validity.") (citation

omitted); *State ex rel. Attorney General v. Irby*, 81 S.W. 2d 419, 420 (Ark. 1935) ("inherently the Chief Executive has no power or authority to grant pardons except that expressly granted by constitutional mandate") (citations omitted); *Horton v. Gillespie*, 279 S.W. 1020, 1024 (Ark. 1926) ("any pardon which does not substantially comply with the requirements . . . must be held to be void."); *Jamison*, 228 P. at 99 ("any pardon issued by [the Governor] when the restrictions and regulations provided by law have not been complied with is issued without authority, and is void"); 59 Am. Jur. 2d *Pardon and Parole* § 34 (2002) ("a pardon . . . issued by the governor without compliance with the regulations and restrictions prescribed by law is void.").

III. All of the cases cited by the majority are distinguishable.

¶106. The majority opines that, while publication is required, it is merely "procedural in nature" and that "even assuming the attorney general's views are correct, . . . [t]he controlling issue is whether the judicial branch of government has constitutional authority to void a facially-valid pardon issued by the coequal executive branch, where the only challenge is compliance with Section 124's publication requirement." (Maj. Op. at ¶¶ 4, 7, 27). In the absence of publication, the governor has *no* power to pardon. Before publication, the power to pardon a convicted felon is not vested and does not "properly belon[g]" to the governor. Miss. Const. art. 1, § 2 (1890).

¶107. Each case relied upon by the majority is distinguishable because it involves demonstrably different facts and, with the exception of *Cleveland*, 98 So. at 111, and *Pope v. Wiggins*, 220 Miss. 1, 69 So. 913 (1954), is wholly unrelated to Section 124. Several support justiciability. I shall address each case as presented by the majority.

Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60 (1803).

¶108. The plea for a mandamus writ easily distinguishes the *Marbury* holding from the case *sub judice*. In *Marbury*, a writ of mandamus was sought, requesting the United States Supreme Court to compel President Thomas Jefferson's Secretary of State, James Madison, to deliver judicial commissions. That remedy has been consistently denied in this state, as this Court has "repeatedly . . . prohibited issuance of a writ of mandamus against the Governor." *Barbour*, 974 So. 2d at 238. *See also Fordice v. Thomas*, 649 So. 2d 835, 840 (Miss. 1995); *McPhail*, 180 So. at 391-92; *Wood*, 142 So. at 749; *Broom*, 100 So. at 603; *Vicksburg and Meridian R.R. Co. v. Lowry*, 61 Miss. 102, 105, 1883 WL 3961 (1883). But "[t]hat is not to say . . . that the acts of the Governor and Secretary of State are beyond review of the courts. Once an act is performed, it is then subject to judicial review. . . . " *Berger*, Order - Case #2008-M-01534-SCT, at 5 (Sept. 18, 2008).

¶109. The present action does not seek to prevent the governor from "attend[ing] to [his] constitutional duties," which are to be "free of interference by way of mandamus, injunction, or instruction." *Id.* at 9. Rather, this action contests whether his actions were beyond his constitutional authority, *i.e.*, whether the putative pardonees satisfied the publication requirement before the governor issued their pardons. Thus, though the governor's authority has been placed at issue, it is the *putative pardonees*' failure to act that determines whether the governor was vested with the authority to issue the pardons. Both the attorney general and the putative pardonees have erred in blaming the governor for this failure. The putative pardonees need to "put the axe at the root of the tree," for the obligation is imposed upon them, or persons acting on their behalf. Since "no governor, or for that matter, any

governmental official, can exercise power beyond their constitutional authority[,]" such review is permissible. **Barbour**, 974 So. 2d at 239 (citations omitted). See also **Berger**, Order - Case #2008-M-01534-SCT, at 9 ("once the Governor and Secretary of State act, their decisions and actions are then subject to judicial review."); **Broom**, 100 So. at 603 (we may not command the governor to act, "yet, when he has acted . . . the legality of the act is a judicial question for the courts.") (citations omitted) (emphasis added). By disregarding the publication requirement of Section 124, this Court becomes an accomplice in the abridgement of the people's right to petition their government. While we are constitutionally restricted from enjoining or mandating the governor to grant or deny a pardon, we can review and nullify acts which exceed his constitutional authority. See State ex rel. City of Kansas City v. Renick, 157 Mo. 292, 57 S.W. 713, 714-15 (1900) (addressing "the validity of the alleged executive pardon" because "[w]hen the judiciary is required to pass judgment on the validity of an act of a co-ordinate branch of the government challenged as being in conflict with the constitution, it exercises the very highest duty intrusted to it, and the most important.").

¶110. Regarding judicial review, *Marbury* provided that "[t]he province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a *discretion*. Questions . . . which are, *by the constitution* and laws, *submitted to the executive*, can never be made by the court." *Marbury*, 5 U.S. at 170 (emphasis added). Yet without constitutional authority to issue a pardon until after publication, the matter was not constitutionally "submitted to the executive," such that the governor had no discretion to exercise. *Id*. The absence of constitutional authority to pardon supports justiciability.

Nixon v. U.S., 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

¶111. In *Nixon*, following hearings before a committee of United States Senators, pursuant to Senate Rule XI, and a subsequent vote before the full Senate, a former district-court judge was impeached. *See id.* at 226-28. The judge filed suit, maintaining that Senate Rule XI violated Article I, Section 3, Clause 6 of the United States Constitution, which provides that "[t]he Senate shall have the sole power to try all Impeachments." *Id.* at 226 (quoting U.S. Const. art. I, § 3, cl. 6). According to the judge, he was constitutionally entitled to a hearing before the full Senate, not merely a committee of Senators. *See Nixon*, 506 U.S. at 229. The Court disagreed and concluded that the matter was nonjusticiable. *See id.* at 226, 237-38. ¶112. The plain language of the constitutional provision in *Nixon* is distinguishable from the plain language of Section 124. Article I, Section 3, Clause 6 provides the Senate with the power to try impeachments without limitation, exception, or specific requirements for its exercise by the Senate. *See* U.S. Const. art. I, § 3, cl. 6. That is patently different from Section 124.

¶113. Based upon the plain language of Article I, Section 3, Clause 6, the *Nixon* Court refused to exercise jurisdiction because the matter of how the Senate exercised its "power to try all Impeachments" involved a "textually demonstrable constitutional commitment of the issue to a coordinate political department" *Nixon*, 506 U.S. at 228. But no such "textually demonstrable constitutional commitment" is present here, because the governor's power to pardon does not exist until thirty days after publication. *Id*. Before thirty days, the pardoning power is committed to *no one*, thus, it has not been "committed solely to another branch" (Maj. Op. at ¶ 27). Additionally, the majority surely would not contend that the

Mississippi Constitution provides a "textually demonstrable . . . commitment" of constitutional interpretation to the governor. *Id*.

¶114. Further distinguishing the *Nixon* pronouncement, we held in *Tuck v. Blackmon*, 798 So. 2d 402 (Miss. 2001), that "this Court . . . has authority to declare Senate rules unconstitutional," when "those rules are 'manifestly' beyond the Senate's constitutional authority." *Id*. at 406-07 (quoting *Dye v. State ex rel. Hale*, 507 So. 2d 332, 345-46 (Miss. 1987)) (emphasis added).

Ex Parte W.V. Wren, 63 Miss. 512, 1886 WL 3462 (1886).

¶115. In *Wren*, a traveling salesman (Wren) was arrested by the county sheriff after he refused to pay a privilege tax mandated in the subject statute. *See id*. at *1. Wren filed a **writ** of habeas corpus which alleged that the subject statute "is not a law" because "the bill signed by the governor was not passed by both houses" *Id*. at *1, 13. This Court found the matter to be "political and not judicial" *Id*. at *19.

¶116. Wren requested that this Court assume the role of fact-finder, by investigating the legislative journals. This Court expressed its concerns about the prudence of attempting to analyze the collective mind of our legislators, and then being required to investigate their actions, because of:

the spectacle of examination of journals by justices of the peace and statutes declared to be not law as the result of their journalistic history, and the circuit and chancery courts . . . constantly engaged in like manner, and this court . . . , on appeal, hav[ing] often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of statutes thus tested.

Id. at *16. But today's case requires no such investigation. We can simply look at the text of Section 124 and apply it to the undisputed fact presented to us that there was no publication as required by Section 124 for some of the putative pardonees.

¶117. Wren also cannot be read without examining other holdings contained therein. It provided that this Court "would not shrink from the investigation of all questions of fact on the existence of which any statute depends" Id. Applying that principle to "questions of fact" upon the existence of which the Constitution depends, in the present case, there is no proof that some convicted felons met the publication requirement, a limitation upon which the governor's pardoning power depends under Section 124. Id.

¶118. Finally, *Wren*'s holding was predicated upon the matters being "confided exclusively to [the Legislature] by the constitution[,]" over which their "power to act is undoubted." *Id.* at **14, 17. According to *Wren*, it would be "fundamental error" for "the judicial department to revise and supervise the legislative as to the manner of its performance of its *appointed constitutional functions*[,]" that the Legislature is "not subject to supervision and control during its performance of its *constitutional functions*[,]" and that "the courts have nothing to do in the way of revision of how the legislature has performed its duty in the *matters confided exclusively to it by the constitution*." *Id.* at *17 (emphasis added). The present case is distinguishable because the governor's "power to act" without publication is more than doubtful – it is nonexistent. *Id.* at *14. Thus, in the absence of publication, the governor has no "appointed constitutional functio[n]" to exercise, i.e., no power to pardon. *Id.* at *17. By virtue of that constitutional infirmity, this Court "should not shrink from declaring [his] act ..., void" *Id.* at *18.

State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

¶119. In *McPhail*, the governor issued an executive order sending the Mississippi National Guard into East Jackson, a notorious area in Rankin County known as the "Gold Coast," to assist in enforcing criminal laws. ¹⁰¹ *See id.* at 388-89. After a search warrant executed by an officer of the National Guard at McPhail's place of business resulted in the seizure of intoxicating liquors, the State sought to abate the establishment as a common nuisance. *See id.* at 389. The chancellor "ruled that the facts were not sufficient to authorize the interference of the militia[,]" excluded the evidence, and dismissed the bill. *Id.* On appeal, this Court reversed and remanded. *See id.* at 392. Notably, this Court did *not* find the matter nonjusticiable, but instead reviewed whether the power exercised by the governor on behalf of the general public ¹⁰² was constitutionally sound, and concluded that "under the state of facts here presented the Governor was within his constitutional and statutory power" ¹⁰³ *Id.*

¶120. As to the "constitutional and statutory provisions" addressing the governor's oversight on execution of the laws, the *McPhail* Court determined that their plain language required:

not that there shall be an arbitrary enforcement by the executive of what he may consider the law to be, but the enforcement of judicial process that is, the enforcement of a right or remedy provided by the law and judicially

¹⁰¹*McPhail* involved "a substantial breakdown in the enforcement of the law" by local authorities in East Jackson. *Id.* at 389. I would opine that the majority's tacit approval of pardons granted to convicted felons in the absence of publication, through its nonjusticiability analysis, is a distinguishable form of "breakdown . . . of the law." *Id.*

¹⁰²Not a person, but all persons.

¹⁰³The Court did not base its decision on whether the governor's executive order was facially valid.

determined and ordered to be enforced. . . . [Such] provisions . . . mean that whatever the Governor does in the execution of the laws . . . must be as [a] civil office[r], and in strict subordination to the general law of the land.

Id. at 389-90 (emphasis added). Similar to those provisions, the publication requirement in Section 124 has "no obscure or technical meaning; neither [was it] intended as a mere verbal adornment" Id. at 389. It means "what is in the ordinary import of the language used" Id. And the "ordinary import" of its language is that no power to pardon exists until after publication. Id. Even the governor of Mississippi must act "in strict subordination" to this "general law of the land." Id. at 390.

¶121. Regarding judicial review, *McPhail* held that:

[o]fficial action, whether the officer be of the highest or the lowest grade, must be within the Constitution and the laws, and the facts must be such as to uphold or justify the exercise of the official authority which in a given case is exerted. If any officer, be he high or low, attempt to exercise an authority not legally vested in him, or if he attempt to do so upon a state of facts which does not bring the asserted authority into existence, his action thence is as much the subject of judicial review and remedial rectification as is the action of any private person within the jurisdiction of the state.

. . .

[W]henever... any ... officer acting or assuming to act for the government, puts into action any agency which comes into collision with the private personal or private property rights of any person within the jurisdiction of the state, such personal and property rights of the citizen and their infringements are always subject to inquiry and redress by the courts, as against any unauthorized act by any officer of the state, whatever his character and rank may be, and all appropriate judicial process will be directed to and against his agents or agencies — and against the officer himself . . .; and the courts will determine for themselves not only the law, but ultimately also whether there be justifying facts, however much may be the weight, prima facie, which the judicial department will yield to the findings of fact by an executive or administrative officer as those upon which he has acted.

Id. at 391-92 (emphasis added). In the present case, absent publication, the governor is either "attempt[ing] to exercise an authority not legally vested in him" or operating under "a state of facts which does not bring the asserted authority into existence" Id. at 391. By disregarding the publication requirement, the governor is acting beyond the scope of his constitutional authority and, by subterfuge, is "unlawfu[ly] violat[ing]," voiding, annulling, and abridging the right to petition the government granted to all citizens. ¹⁰⁴ *Id*. at 392; Miss. Const. art. 3, §§ 11, 32 (1890). As noted in paragraph 110 supra, the present action does not involve an impermissible "mandamus, prohibition, or injunction direct[ing] or restrain[ing] [the governor] in the exercise of his power." McPhail, 180 So. at 392 (emphasis added). As such, under *McPhail*, the governor's unauthorized action is a "subject of judicial review and remedial rectification[,]" because "[u]nder our form of government there is no arbitrary power, that is to say, no power above the law; but every unlawful power is the subject of scrutiny by the courts, [w]here it operates to the legal hurt of any citizen, however humble." *Id*. at 391-92.

Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111 (1923).

¶122. In *Cleveland*, Cleveland filed a writ of habeas corpus against various trustees (collectively, Montgomery) seeking discharge from the state penitentiary based upon a pardon issued by the lieutenant governor. *See id.* at 111. Significantly, publication was not

¹⁰⁴ Why the majority declares that the absence of publication does not violate any and all citizens' personal right to petition the government, which is guaranteed to every person in our Constitution, remains a mystery. Here, the State stands before this Court on behalf of the people, claiming a right to petition the government for thirty days before the governor's power to pardon is vested; with the governor thereafter having no obligation to heed their advice, one way or the other.

at issue because an agreed statement of facts provided that the requirement had been satisfied. See id. This Court did not find that a facially valid pardon commanded Cleveland's release, but rather considered facts regarding the legality of the pardon, i.e., whether the governor was in the state, before the Court deemed it valid. See id.

¶123. This Court stated that the governor "is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, and no other department of the government has any control over his *acts or discretion* in such matters. . . . [N]o authority other than his judgment and conscience can determine whether it is proper to grant or refuse the pardon " *Id.* at 114 (emphasis added). In the absence of publication, however, the governor has no constitutional authority to "ac[t,]" or "discretion" to exercise, in granting a pardon to a convicted felon. *Id.* Only after publication for thirty days is the governor free to consider (or not consider) any "facts" regarding the pardon (i.e., the crime of conviction, post-conviction behavior, the possibility of actual innocence and/or the gross miscarriage of justice, ¹⁰⁵ public comment, pro and con, etc.) in deciding "the propriety of granting the pardon" *Id. Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954).

¶124. In *Pope*, Pope filed a **writ of habeas corpus** against the superintendent of the Mississippi State Penitentiary (Wiggins) after Pope's suspended sentence was revoked by the governor without notice or hearing. ¹⁰⁶ See id. at 913-14. In discussing Section 124, this

¹⁰⁵Neither of these is claimed in this case.

¹⁰⁶**Pope** illustrates why clemency is disfavored by some. Following the governor's suspension of sentence and release of Pope for a murder committed in Leflore County, Pope was indicted for another murder in Bolivar County. *See id.* at 914. It also calls into question the purported significance of amicus counsel's assertion at oral argument, referred to in footnote 69 of Justice Chandler's concurrence, that, according to the governor, "no public comment would have changed

Court did not address the publication "portion," as it was not "pertinent" to the holding. *Id.* at 915. Regarding Section 124, this Court stated that the power to pardon "is not limited by any *other* provision" *Id.* (emphasis added). I would agree with *Pope* that no *other* constitutional provision limits the power to pardon, for indeed the limitations are expressly set forth in Section 124.

Hunt v. Wright, 70 Miss. 298, 11 So. 608 (1892).

¶125. In *Hunt*, a mandamus action was filed that sought to compel the tax collector and sheriff (Wright) to issue Hunt a license to sell liquors by the gallon. ¹⁰⁷ See id. at 609. Hunt claimed that the subject statutes regarding "dramshops" and "privilege taxes" were "ineffectual" for various reasons, including, *inter alia*, that they were "passed within the last five days of the session . . . " Id. Relying upon *Wren*, this Court found that it "is not an overseer of the legislature during its labors" and that the "enactment has all the forms and requirements of law as prescribed by the constitution" Id. at 609-10.

¶126. Because of Hunt's reliance upon Wren, the prior analysis regarding Wren is applicable. See supra ¶¶ 117-19. For instance, the Hunt Court stated that for constitutional

his decision to pardon the appellants." (Chandler Op. at ¶ 74 n.69). In the absence of sworn testimony or affidavit, I attribute such a dubitable claim to overzealous advocacy, in light of the revelation that, when putative pardonee Harry Bostick received his pardon, he:

was sitting in an Oxford, Mississippi, jail cell for violating the terms of a previous DUI sentence and was awaiting formal charges from yet another drunken driving accident in October that ended in the tragic death of 18-year-old Charity Smith.

See http://www.cnn.com/2012/02/03/justice/mississippi-pardon-dui/index.html (last visited Mar. 7, 2012). According to the governor's spokeswoman, the governor "wasn't aware of the subsequent charges" when reviewing Bostick's case. *Id*.

¹⁰⁷Preliminarily, for the reasons discussed in paragraph 110 *supra*, a demand for mandamus in *Hunt* distinguishes that case.

"rules of procedure prescribed for the legislature, . . . the houses are intended as a mutual check, and the governor on both" *Id*. at 610. Because a bill requires approval by both houses and the governor to become law, these checks existed. By contrast, without judicial review, no check exists for the unauthorized exercise of a power not conferred by the Constitution.

¶127. Furthermore, unlike *Hunt* and *Wren*, the present case does not require this Court to engage in the equivalent of "scrutiniz[ing] the daily doings of the legislature." *Id*. We need only apply the text of Section 124 to the conceded facts that some putative pardonees failed to meet the thirty-day publication requirement.

¶128. Finally, while *Tuck* cited *Hunt* and *Wren* for the proposition that "procedural provisions for the operation of the Legislature . . . should be left to the Legislature to apply and interpret, without judicial review[,]" it further stated that "this Court . . . has the authority to declare Senate rules unconstitutional," when "those rules are 'manifestly' beyond the Senate's constitutional authority." *Tuck*, 798 So. 2d at 406-07 (quoting *Dye*, 507 So. 2d at 345-46).

Lang v. Board of Supervisors, 114 Miss. 341, 75 So. 126 (1917).

¶129. In *Lang*, a landowner (Lang) filed suit seeking to **enjoin** the board of supervisors from issuing road bonds, pursuant to the subject statutes, in districts where his property was located. *See id.* at 126-28. Lang claimed that "the act is unconstitutional because of an insufficient title." *Id.* at 128. This Court determined "that the sufficiency of the title is a question solely for the Legislature." *Id.* But this Court added that "an act without a title would not be a law" *Id.* (quoting *City of Jackson v. State*, 102 Miss. 663, 684, 59 So.

873, 874 (1912)). A pardon granted to a convicted felon before publication is equivalent to "an act without a title" *Id*. In the present case, the State does not contest that sufficiency of the reason for a pardon is nonjusticiable.

In re Moore, 4 Wyo. 98, 31 P. 980 (1893).

¶130. The Wyoming Constitution provided that:

[t]he governor shall have power to remit fines and forfeitures, to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment; but the legislature may by law regulate the manner in which the remissions of fines, pardons, commutations and reprieves may be applied for.

Id. at 981 (quoting Wyo. Const. art. 4, § 5). In *Moore*, the Wyoming Supreme Court addressed the impact of "[t]he nonobservance of certain *statutory* provisions as to giving and publishing notice of the application for a pardon" In re Moore, 31 P. at 981 (emphasis added). That court concluded that such statutes regulated only "the method of procedure by petitioners to bring their applications before the governor in a manner to entitle them to be heard," and did not limit "the authority or discretion of the Governor, when he saw fit to exercise it on different grounds." Id. As this subject went beyond "the jurisdiction of the governor[,]" the court deemed it nonjusticiable. Id. at 982.

¶131. The textual differences between the Wyoming Constitution and the Mississippi Constitution distinguish *In re Moore*. The Wyoming Constitution stated only that the Legislature could regulate the "manner" of application for pardons. *Id.* at 981 (quoting Wyo. Const. art. 4, § 5). It made no reference to the governor's power to pardon being limited by the absence of a statutorily mandated application. By contrast, the Mississippi Constitution expressly provides that no pardon to a convicted felon "shall be granted" until the publication

requirement is satisfied. Miss. Const. art. 5, § 124 (1890). In Mississippi, the governor has been granted no power to pardon a convicted felon before publication.

IV. Conclusion

¶132. The legal morass and uncertainties created by this proceeding could have been avoided by simply following the express language in the Constitution. Section 124 plainly requires that publication for thirty days be met before the governor is constitutionally empowered to pardon a convicted felon. As Presiding Justice Dickinson previously has opined, "I cannot overlook . . . my constitutional duty to apply the law as it is written. I simply do not believe I have the right to apply some laws, and ignore others " Lee, 999 So. 2d at 1271 (Dickinson, J., dissenting). I would remand this case to the Circuit Court of Hinds County for proceedings consistent with this opinion. The question for the circuit court would be whether the putative pardonees complied with the Constitution, for, as the majority finds, the convicted felons have an obligation to apply and publish thirty days before a pardon may be granted. (Maj. Op. at ¶ 4, 49). The pardons are presumed valid, but their validity "may be controverted by the [State]" Wilson, 31 U.S. at 161. The circuit court would determine whether the State has overcome the presumption of validity. For any putative pardonees that have satisfied the application and publication requirements, their pardons should be honored, and the reasons for granting the pardons are not subject to review by any court. On behalf of the people, the Constitution, our body of law, and for the reasons stated herein, I respectfully dissent.

WALLER, C.J., AND PIERCE, J., JOIN THIS OPINION.

PIERCE, JUSTICE, DISSENTING:

That great constitutional and legal questions may become topics of political and even partisan controversy should never be employed by this Court as an excuse to duck its responsibility to adjudicate the legal and constitutional rights of the parties.

Dye v. State ex rel. Hale, 507 So. 2d 332, 339 (Miss. 1987).

¶133. Many issues presented to this Court require complex analysis, not always because the words before us are hard to understand; rather, because we make them so. I find this case simply an analysis of words and a determination of their legal meaning. To be clear, Article 5, Section 124, of the 1890 Mississippi Constitution is neither hard to apply nor difficult to understand.

¶134. Section 124 calls to us from 1890 and beckons this Court to read it and apply its meaning—as written. In a real sense, Section 124 is dressed up and ready to go. Sadly, the majority drives by without so much as slowing down. Thus, Section 124 will forever be waiting—its word never judicially determined.

¶135. Though rudimentary, it cannot be too often repeated that the legislative, executive, and judicial departments of this State all owe their existence to the Mississippi Constitution. Miss. Const. art. 1, §§ 1, 2. Their powers are derived from and limited by that instrument. *See Griffin v. Mixon*, 38 Miss. 424, 438 (1860) ("They can do nothing without its sanction[.]"). One department no more represents the sovereignty of the State than either of the other two. Miss. Const. art. 1, §§ 1, 2. And by duty and necessity, the obligation of determining whether, in specific instances, one of the departments has exceeded the powers granted to it, "devolves" upon the judiciary. *Albritton v. City of Winona*, 178 So. 799, 803 (Miss. 1938). By its decision today, this Court has not only abdicated the judiciary department's contemplated role

under our theory of government, it has effectively amended Section 124 of the 1890 Mississippi Constitution back to Article 5, Section 10 of the 1868 Mississippi Constitution. ¹⁰⁸ By the written word, the majority has turned the constitutional clock back to 1868.

¶136. Undoubtedly, the power to pardon in this country derives from the people. Whittington v. Stevens, 221 Miss. 598, 603, 73 So. 2d 137, 139 (1954). It is an act of the sovereign's "mercy and grace." Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111, 114 (1923). The sovereign may vest its exercise in any governmental body it chooses. Id. As well, the sovereign may properly divest its exercise therefrom. Cf. Herrera v. Collins, 506 U.S. 390, 414, 113 S. Ct. 853, 867, 122 L. Ed. 2d 203 (1993) (noting that the United States Constitution "does not require the States to enact a clemency mechanism").

¶137. The case of *Jamison v. Flanner*, 228 P. 82 (Kan. 1924), decided by the Supreme Court of Kansas, provides us one of the most elaborate opinions on the subject of pardoning power. *Jamison* was a *habeas corpus* action in which the governor of Kansas had commuted S.H. Jamison's sentence, but the sheriff had refused to release him from jail because notice was not given to the trial judge or county attorney, nor published in the county newspaper, as required by law, then "R.S. 62-2216." *Id.* at 83. A lower court rendered judgment granting the writ and discharging Jamison, and the sheriff appealed. *Id.* The Kansas Supreme Court reversed the judgment with directions to deny the writ. *Id.* at 99. In reaching its decision, the Kansas Supreme Court conducted an exhaustive examination of this country's clemency

¹⁰⁸ Mississippi has adopted four Constitutions since it entered the Union in 1817, the first in 1817, and those that followed in 1832, 1868, and 1890.

jurisprudence. In construing the Kansas Constitution of 1861, Article 1, Section 7,¹⁰⁹ the Kansas Supreme Court surveyed practically every state constitution, as well as numerous court opinions from various jurisdictions. *Id.* at 83-99. And it concluded with the following:

We have summarized the constitutional provisions of the several states and the changes made therein and the decisions of the courts thereon, for the reason that they demonstrate, more forcibly than anything we could say, (1) the purpose of the pardoning power of a government, (2) that in our country it is a power inherent in the people, who may place its exercise in any department or official of the government, (3) that its proper use is beneficial, its improper use is detrimental, and (4) that to avoid its improper use the people may restrict and regulate it by constitutional provision or may by their Constitution provide that it may be restricted and regulated from time to time by the Legislature. And this is what was done in our state.

Id. at 99.

¶138. I find the *Jamison* decision very sound. The Kansas Supreme Court had no trepidation in holding that Kansas courts may inquire into whether a pardon granted by that state's governor had been issued in accordance with the restrictions and regulations provided by Kansas law.¹¹⁰

¹⁰⁹ This section, which remains unchanged to date, provides that: "The pardoning power shall be vested in the governor, under regulations and restrictions prescribed by law." Kan. Const. art. 1, § 7.

^{913 (1954),} out of context – as does the majority for its part. The question presented there was not whether the notice and publication requirements prescribed by Section 124 must be complied with. Rather, it was whether the governor had authority to revoke a prisoner's conditional pardon without a revocation hearing, even in the face of a statute which affected the power of the courts to grant suspended sentences and to revoke them on a proper showing. *Id.* at 914-15. The *Pope* Court found only the first portion of Section 124 pertinent, and made no mention of the notice and publication requirements set forth in the latter portion of Section 124. *Id.* at 915. The *Pope* Court spoke to *Jamison* because the prisoner, Nora (Noah) Pope, had relied on that case in support of his contention that the Legislature can prescribe conditions for the exercise of the governor's pardoning authority. *Id.* at 916. *Pope* correctly found *Jamison* inapplicable on the question before it, because Section 124 contains no provision authorizing "the Legislature to restrict and regulate the pardoning power of the governor." *Id.*

¶139. Here, though, we are not asked to decide whether a statute limiting the governor's pardoning power was complied with. Such a scenario could have developed under the first Mississippi Constitution of 1817, because that Constitution reserved in the Legislature the right to determine how the governor's pardoning power should be exercised. Now, however, we are asked to determine whether the constitutional strictures set forth by Section 124 in our current Constitution must be complied with.

¶140. Even though the majority maintains they must, it nonetheless contends that the inquiry as to whether they were ends with the governor. This, according to the majority, is because the notice requirement is (1) likely "more about" the Governor's right to receive complete information before issuing a pardon, and/or (2) the publication requirement is a right that "inures to the benefit of the public, in general, and not to any particular private person."

¶141. Respectfully, I find the majority's reasoning unsound. Neither the 1817, the 1832, nor the 1868 Mississippi Constitution required notice and publication. *See supra* n.111 (1817 clemency provision). The 1832 and 1868 provisions pertaining to clemency read identically and provided that:

In all criminal and penal cases, except in those of treason and impeachment, he shall have power to grant reprieves and pardons, and remit fines, and in cases of forfeiture, to stay the collection until the end of the next session of the Legislature, and to remit forfeitures, by and with the consent of the Senate. In

¹¹¹ See Miss. Const. art. 4, § 10 (1817), which provided:

In all criminal and penal cases, except in those of treason and impeachment, he shall have power to grant reprieves and pardons and remit fines and forfeitures, under such rules and regulations as shall be prescribed by law. In cases of treason, he shall have power to grant reprieves and pardons, by and with the advice and consent of the Senate, but may respite the sentence until the end of the next session of the General Assembly.

cases of treason, he shall have power to grant reprieves, by and with the consent of the Senate, but may respite the sentence until the end of the next session of the Legislature.

See Miss. Const. art. 5, § 10 (1832, 1868). Had the delegates to the 1890 Constitutional Convention intended to make the exercise of the people's mercy and grace "more about" the governor's benefit, they simply could have left well enough alone by carrying forward the 1868 provision. Obviously, that was not their intention.

¶142. What was their intention? I am confident to say after reading the plain language of Section 124, their intention was to keep in check a power subject to no substantive measure. We know that, since this State's inception, the governor has been the custodian of the sovereign's pardon prerogative and is vested with the authority to act as "sole judge of the sufficiency of the facts and of the propriety of granting the pardon, and no other department of the government has any control over [the governor's] acts or discretion in such matters." *Cleveland*, 98 So. at 114. But with that authority comes immense responsibility under our theory of government. As the *Jamison* Court cogently pointed out, when properly used, the government's pardoning power is beneficial to the public, but when improperly used, it is detrimental. *Jamison*, 228 P. at 99. The reason for the notice and publication requirements adopted by the 1890 delegates was in contemplation of the latter. These requirements are intended to operate as a check on the governor's substantive discretion, by making the exercise thereof transparent to the public.

¶143. The majority appears to reason that, because only the public's rights are at stake, and not any particular person's, the question of whether the constitutional strictures of Section 124 were met is nonjusticiable. If that is the majority's position, it is an untenable one. If Section

124 did require actual notice to particular persons, would failure to provide notice in that instance make the matter justiciable? Presumably, the governor still would have the autonomy to grant the pardon, irrespective of whatever complaint a particular individual might lodge in opposition to it. So how, exactly, would failure to provide notice in that instance constitute an act subject to judicial review, but not here? The sincere answer is that, based on the majority's holding today, a future Court would hold the question there nonjusticiable as well.

¶144. Lastly, Justice Randolph well distinguishes each of the cases relied upon by the majority to reach its holding in this case. I write further to add what another scholarly jurist has discerned with regard to *Hunt v. Wright*, 70 Miss. 298, 11 So. 608 (1892), as well as *Ex* parte Wren, 63 Miss. 512 (1886).

¶145. In Jeffrey Jackson's & Mary Miller's Encyclopedia of Mississippi Law, Judge Leslie H. Southwick construed the case of *Tuck v. Blackmon*, 798 So. 2d 402 (Miss. 2001). 8 Judge Leslie Southwick, *Encyclopedia of Mississippi Law* (Jeffrey Jackson and Mary Miller eds.) § 68:8 (2001). Judge Southwick began by pointing out that the respective parties in *Tuck* had debated, in their briefs, the significance of *Hunt*, with one side seeking to have it overruled and the other side emphasizing its "separation of powers aspects." *Id.* Judge Southwick then made the following observation with regard to this Court's opinion in *Tuck*:

The Supreme Court stepped back from the absolutism of *Hunt v. Wright*. Instead of being beyond the Court's authority, determining the propriety of the legislative decision as to the meaning of its own rules was held to be within the Court's prerogatives. However, the power to declare the legislative interpretation in error would be sparingly used: An interpretation by the Senate of the extent of its power under the Constitution, while not binding on the courts, should be accepted unless manifestly wrong.

Making the interpretation of rules a matter of cautiously exercised discretion as opposed to being beyond the power of the judiciary is a profound change affecting the understanding of separation of powers.

. .

The Court found that *Dye* changed *Hunt v. Wright.* "The rule annunciated in [*Hunt* and *Wren*] and refined by *Dye* is a statement of the well precedented and respected political question doctrine itself grounded in prudent judicial restraint." The Supreme Court indicated that it no longer recognizes that judicial review is unavailable as to the application of legislative procedural rules that antedate the "parturition" of a statute.

The Court proceeded closely to examine the constitutional provision for oral reading of bills, and reviewed a variety of authorities on the issue. This is effectively an overruling of *Hunt*, since the court judicially reviews the accuracy of the senate's interpretation of a constitutional provision that affects action taken prior to completion of a bill. The Court concluded with "[i]t is impossible for us to say that [the lieutenant governor's] ruling was arbitrary or manifestly wrong."

Id. (footnotes omitted).

¶146. I agree with Judge Southwick's interpretation of *Tuck*, particularly after reading *Dye*, which expressly found the question presented there to be justiciable. *See Dye*, 507 So. 2d at 339. In so finding, the *Dye* Court, notably, did not refer to either *Hunt* or *Wren*. Yet, in the spirit of those two cases, *Dye* reiterated that "we will as a general rule decline adjudication of controversies . . . [that] relate solely to the internal affairs of [the respective] department[s]." *Dye*, 507 So. 2d at 338. Significantly, the *Dye* Court immediately thereafter also reminded itself that neither the departments nor the individuals that comprise them "are above the law, and in those rare instances where a claim is presented that the actions" taken by one of those bodies "contravene rights secured by the constitution of the United States or of this [S]tate, it is the responsibility of the judiciary to act" *Id.* at 338-39 (*citing*

Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 940-44, 103 S. Ct. 2764, 2778-80, 77 L. Ed. 2d 317, 338-40 (1983); Powell v. McCormack, 395 U.S. 486, 516-22, 547-49, 89 S. Ct. 1944, 1977-78, 23 L. Ed. 2d 491, 514-17, 531-33 (1969)). Dye added, where "[t]here is a public need that the legal issues tendered be authoritatively resolved[;] [n]ot only do we have the authority to decide [such] questions[,] we have a public responsibility to do so." Id. at 339 (citing Frazier et al. v. State, 504 So. 2d 675, 692-93 (Miss. 1987)).

¶147. Here, this Court has been asked to resolve, authoritatively, whether the pardons issued by Governor Barbour complied with Section 124's notice and publication requirements. But rather than decide the question, the majority re-embraces *Hunt* and *Wren* and expands their holdings to find the matter nonjusticiable. In so doing, the majority has effectively countenanced a view that almost any interpretation the executive or legislative departments may give to the Mississippi Constitution—no matter how erroneous—is now binding on the judiciary. This is a plank I choose not to walk.

¶148. I find the constitutional notice and publication requirements of Section 124 to be mandatory. They are meant to ensure transparency in the governor's exercise of the pardoning power. A pardon issued by the governor when the notice and publications requirements have not been met, is issued without constitutional authority. Thus, the question whether the pardon had been issued in compliance with the constitutional notice and publication requirements is justiciable and may be inquired into by the courts. For these reasons, I respectfully dissent.

WALLER, C.J., AND RANDOLPH, J., JOIN THIS OPINION.